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HUMAN RIGHTS QUESTIONS: HUMAN RIGHTS QUESTIONS, INCLUDING ALTERNATIVE APPROACHES FOR IMPROVING THE EFFECTIVE ENJOYMENT OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

SECURITY COUNCIL
Fifty-fourth year

Identical letters dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of of the Security Council

By resolution 52/135 the General Assembly requested me to examine the request of the Cambodian authorities for assistance in responding to past serious violations of Cambodian and international law, and those committed by the Khmer Rouge, in particular, and to that end to examine the possibility of appointing a Group of Experts. I accordingly appointed a three-member Group of Experts to evaluate the existing evidence with a view to determining the nature of the crimes committed by Khmer Rouge leaders in the years 1975-1979; to assess the feasibility of their apprehension; and to explore legal options for bringing them to justice before an international or national jurisdiction.

The Group of Experts visited Cambodia and Thailand from 14 to 24 November 1998. It met with the then Second Prime Minister, Hun Sen, with representatives of Government ministries and of non-governmental organizations and private individuals. It also visited the Documentation Centre, the National Archives and the Tuol Sleng prison (the so-called "Museum of Genocide"). The Group of Experts submitted its report to me on 22 February 1999 (see annex). A copy of the report was given on the same day to the Government of Cambodia for its consideration.

On the basis of a review of the material and documents made available to it, the Group of Experts concluded that the evidence gathered to date testifies to the commission of serious crimes under international and Cambodian law, and that sufficient physical and witness evidence exists to justify legal proceedings against the Khmer Rouge leaders for those crimes. It considered that the crimes committed by Khmer Rouge leaders during the 1975-1979 period

included crimes against humanity, genocide, war crimes, forced labour, torture and crimes against internationally protected persons, as well as crimes under Cambodian law.

In the view of the Group, the question of the feasibility of apprehending Khmer Rouge leaders turned on the ability and willingness of the Government, in whose territory suspects are located, to effectuate their arrest or extradition. The Group of Experts concluded that the Government of Cambodia is able to apprehend Khmer Rouge leaders in its territory whose location is known and who are not protected physically from arrest. In their meeting with the Prime Minister, Mr. Hun Sen expressed his Government's willingness and readiness to apprehend any person indicted by the independent prosecutor of an international tribunal, should one be established. Similar expressions of willingness were made by the Government of Thailand.

The Group of Experts analysed the following legal options for bringing Khmer Rouge leaders to justice: a tribunal established under Cambodian law; a tribunal established by the Security Council or the General Assembly as an ad hoc international tribunal; a mixed option of a Cambodian tribunal under United Nations administration; an international tribunal established by a multilateral treaty and trials in third States.

It recommended that in response to the request of the Government of Cambodia, the United Nations should establish an ad hoc international tribunal to try Khmer Rouge officials for crimes against humanity and genocide committed from 17 April 1975 to 7 January 1979, that the Security Council establish this tribunal under Chapter VI or VII of the Charter of the United Nations, or, should it not do so, that the General Assembly establish it. They further recommended that the United Nations, in cooperation with the Cambodian Government and non-governmental sector, encourage a process of reflection among Cambodians to determine the desirability and, if appropriate, the modalities of a truth-telling mechanism to provide a fuller picture of the atrocities of the period of Democratic Kampuchea.

Having considered the report, the Government of Cambodia, in a letter addressed to me dated 3 March 1999, cautioned that any decision to bring Khmer Rouge leaders to justice must take account of Cambodia's need for peace and national reconciliation, and that, if improperly conducted, the trials of Khmer Rouge leaders would create panic among other former Khmer Rouge officers and rank and file and lead to a renewed guerrilla war. At a meeting I held on 12 March with the Minister for Foreign Affairs and International Cooperation of Cambodia, Hor Namhong, he conveyed to me his Government's view that, on the basis of article 6 of the Convention on the Prevention and Punishment of the Crime of Genocide and article 33 of the Cambodian Constitution, the Cambodian courts were fully competent to conduct any such trial. He recalled that the criminals are Cambodians, the victims were Cambodians and the crimes were committed in Cambodia. The Foreign Minister therefore informed me of his Government's decision to put on trial Ta Mok, the former Khmer Rouge military commander of the south-west region and a member of the Standing Committee, before a Cambodian court under Cambodian law, and to accept foreign assistance and expertise to that end.

At the same meeting, I reminded the Foreign Minister that the Group of Experts had carefully considered the feasibility of a national tribunal, but concluded that the Cambodian judiciary in its current state was unlikely to meet minimal international standards of justice, even with external assistance. I remain concerned about the credibility of any trial process.

This report is submitted to the General Assembly and the Security Council, as the implementation of the recommendations contained therein call for action by either or both organs. But while the mandate of the Group of Experts emanated from the General Assembly, members of the Council will recall that the initial Cambodian request for United Nations assistance in bringing Khmer Rouge leaders to trial was submitted by me to both organs (A/51/930-S/1997/488), and that subsequently I informed the Council of the establishment, mandate and composition of the Group of Experts.

The decision on the establishment of an international tribunal, whether under Chapter VI or VII of the Charter of the United Nations, is for the Security Council or the General Assembly to make. I am confident that they will take the report fully into account in their determination of how best to accommodate the principles of justice and national reconciliation in Cambodia. It is my view, however, that the trial of a single Khmer Rouge military leader which would leave the entire political leadership unpunished would not serve the cause of justice and accountability. It is, therefore, my view that Khmer Rouge leaders responsible for the most serious of crimes should be brought to justice and tried before a tribunal which meets the international standards of justice, fairness and due process of law. Impunity is unacceptable in the face of genocide and other crimes against humanity.

I am firmly of the view that if the international standards of justice, fairness and the process of law are to be met in holding those who have committed such serious crimes accountable, the tribunal in question must be international in character. This does not necessarily mean that it should be modelled after either of the existing ad hoc tribunals or be linked to them institutionally, administratively or financially. Other options may be explored, taking into account the analysis and conclusions of the Group of Experts. The success of any international tribunal of whatever character, however, presupposes the full cooperation of the Government of Cambodia and its readiness to apprehend Khmer Rouge leaders situated in its territory and surrender them to the international tribunal upon request. I stand ready to assist the General Assembly, the Security Council and the Government and people of Cambodia in bringing about a process of judicial accountability, which alone can provide the basis for peace, reconciliation and development.

(Signed) Kofi A. ANNAN

ANNEX

Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135

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I. INTRODUCTION

1. Twenty-four years ago, a new government took power in Cambodia and proceeded, in the course of its brief reign of three years and nine months, to commit some of the most horrific violations of human rights seen in the world since the end of the Second World War. By the end of the terror in January 1979, the regime's actions had led to the deaths of nearly a fifth of Cambodia's population. Yet a generation later, those responsible for organizing, instigating and carrying out those crimes against humanity continue to enjoy complete impunity. The legacy of their crimes, and indeed the legacy of that impunity, continue to haunt Cambodia to this day.

2. Bringing these men to justice is a matter not only of moral obligation but of profound political and social importance to the Cambodian people. For accountability first and foremost is a statement to the millions of Cambodian victims and their relatives and friends that their cries have at last been heard, providing the survivors with a sense of justice and some closure on the past. Justice is also a critical element for repairing the damage done to that society by the massive human rights abuses and for promoting internal peace and national reconciliation. By having those who committed the abuses identified and punished, Cambodians can better understand their own past, finally place this most tragic period and those responsible for it behind them, and work together to build a peaceful and better future. And accountability can play an important preventive role in Cambodia - demonstrating to those contemplating offences that punishment is at least possible, and promoting an awareness among the people about the meaning of justice and the rule of law.

3. Accountability for the past and national reconciliation for the future are thus not innate opposites or even competing goals. Their connection lies behind the Cambodian Government's request to the international community for assistance in bringing about justice - a request that responds directly to the will of the Cambodian people and has been strongly supported by the King of Cambodia, Norodom Sihanouk. And if justice is brought about with sensitivity to a country's own situation, accountability and national reconciliation are, in fact, complementary, even inseparable. It is with this understanding of justice in the Cambodian context that the United Nations has created this Group of Experts, and it is in this spirit that we submit this report.

II. MANDATE, COMPOSITION AND PROGRAMME OF WORK

4. On 12 December 1997, the General Assembly adopted resolution 52/135, entitled "Situation of human rights in Cambodia". The resolution addressed the state of human rights in Cambodia and included the following two paragraphs:

> "15. Endorses the comments of the Special Representative that the most serious human rights violations in recent history have been committed by the Khmer Rouge and that their crimes, including the taking and killing of hostages, have continued to the present, and notes with concern that no Khmer Rouge leader has been brought to account for his crimes;

"16. Requests the Secretary-General to examine the request by the Cambodian authorities for assistance in responding to past serious violations of Cambodian and international law, including the possibility of the appointment, by the Secretary-General, of a group of experts to evaluate the existing evidence and propose further measures, as a means of bringing about national reconciliation, strengthening democracy and addressing the issue of individual accountability".

5. This request by the Cambodian authorities for assistance appeared in a letter dated 21 June 1997 from the then-First Prime Minister of Cambodia, Prince Norodom Ranariddh, and the then-Second Prime Minister of Cambodia, Hun Sen, which stated in pertinent part:

"On behalf of the Cambodian Government and people, we write to ask you for the assistance of the United Nations and the international community in bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979.

"The April 1997 resolution on Cambodia of the United Nations Commission on Human Rights requests:

> 'the Secretary-General, through his Special Representative, in collaboration with the Centre for Human Rights, to examine any request for assistance in responding to past serious violations of Cambodian and international law as a means of bringing about national reconciliation, strengthening democracy and addressing the issue of individual accountability'.

"Cambodia does not have the resources or expertise to conduct this very important procedure. Thus, we believe it is necessary to ask for the assistance of the United Nations. We are aware of similar efforts to respond to the genocide and crimes against humanity in Rwanda and the former Yugoslavia, and ask that similar assistance be given to Cambodia.

"We believe that crimes of this magnitude are of concern to all persons in the world, as they greatly diminish respect for the most basic human right, the right to life. We hope that the United Nations and international community can assist the Cambodian people in establishing the truth about this period and bringing those responsible to justice. Only in this way can this tragedy be brought to a full and final conclusion."

The Commission on Human Rights resolution referred to in the above letter is resolution 1997/49, adopted on 11 April 1997.

6. In accordance with resolution 52/135, in July 1998, the Secretary-General created the Group of Experts for Cambodia with the following mandate:

(a) To evaluate the existing evidence with a view to determining the nature of the crimes committed by Khmer Rouge leaders in the years from 1975 to 1979;

(b) To assess, after consultation with the Governments concerned, the feasibility of bringing Khmer Rouge leaders to justice and their apprehension, detention and extradition or surrender to the criminal jurisdiction established;

(c) To explore options for bringing to justice Khmer Rouge leaders before an international or national jurisdiction.

The Secretary-General appointed, as members of the Group, Sir Ninian Stephen (Australia), who is the Chairman of the Group, Judge Rajsoomer Lallah (Mauritius) and Professor Steven R. Ratner (United States of America). By letters dated 31 July 1998, the Secretary-General informed the President of the General Assembly, the President of the Security Council and the first and second Prime Ministers of Cambodia of the formation of the Group, its mandate and composition.

7. The Group's work has been conducted in three stages: legal and historical research on the issues related to its mandate; consultations and meetings with a wide variety of officials from Governments, international organizations and non-governmental organizations; and deliberation and preparation of the present report. The bulk of the consultations and meetings took place during two missions of the Group: to United Nations Headquarters from 7 to 11 September 1998; and to Phnom Penh and Bangkok from 14 to 24 November 1998. In addition, individual members of the Group held meetings with persons whose views were considered important to the work of the Group and the Group met at the Office of the United Nations High Commissioner for Human Rights in Geneva from 27 to 29 January to finalize its recommendations. A list of the persons with whom the Group met is attached as an annex to the present report.

8. The Group wishes, at the outset, to note with appreciation the critical assistance it received from Mr. David Ashley, who served as the Group's adviser on Cambodian affairs and the Khmer Rouge, as well as its Khmer language interpreter for many meetings in Cambodia; the United Nations Office of Legal Affairs, in particular Ms. Daphna Shraga, Senior Legal Officer; the Office of the United Nations High Commissioner for Human Rights, in particular, Ms. Rosemary McCreery, Director of the Cambodia Office of the Office of the United Nations High Commissioner for Human Rights; Ms. Hannah Wu, Cambodia desk officer in Geneva; and last, but not least, Mr. Thomas Hammarberg, the Special Representative of the Secretary-General for Human Rights in Cambodia. We are most grateful for their unfailing assistance to all our work.

9. Before concluding this introduction, several interpretive points about the mandate should be noted. First, the mandate directs the Group to consider the human rights violations of the Khmer Rouge only during the period from 1975 to 1979. We interpret this to mean the period of the Khmer Rouge's rule as the Government of Cambodia, or Democratic Kampuchea as it was then called, that is, from 17 April 1975 to 7 January 1979. The human rights violations of the Khmer Rouge before or after that period are beyond the scope of inquiry of the Group, except insofar as it is necessary to discuss them in addressing the main mandate of the Group.

10. Second, the mandate is limited to the acts of the Khmer Rouge and not those of any other persons or, indeed, States, that may have committed human rights

abuses in Cambodia before, during, or after the period from 1975 to 1979. This mandate was based on the request of the Cambodian Government quoted above. The Group endorses this limitation as focusing on the extraordinary nature of the Khmer Rouge's crimes.

11. Third, the mention in the mandate of criminal jurisdiction means that the focus of the present report is on the criminal prosecution of leaders of the Khmer Rouge. Nevertheless, the Group believes that the mandate given us by the Secretary-General must be read in the light of resolution 52/135, and, thus, the Group discusses other methods of accountability in this report. Moreover, the language of that resolution also informs our views on the appropriate targets of prosecutorial and non-prosecutorial mechanisms, an issue we delve into in greater detail later in the report.

12. Our report is organized according to the terms of our mandate. After a discussion of the historical background, the report considers the state of the evidence, the nature of the crimes committed, the feasibility of bringing leaders to justice and the options for bringing persons to justice. It concludes with a summary of our principal recommendations.

III. HISTORICAL BACKGROUND

13. An understanding of the numerous issues facing the Group of Experts requires some background on the recent history of Cambodia, the activities of the Khmer Rouge during their reign and the absence of any accountability to date for their acts.[1] Although many aspects of this period remain a subject of popular confusion and historical research, the broad outlines of the events are known.

14. 17 April 1975 marked a horrific turning point in the history of Cambodia. On that day, Phnom Penh fell to the forces of the Communist Party of Kampuchea, popularly known as the Khmer Rouge. The Khmer Rouge's armed struggle against the government in Phnom Penh had begun in the late 1960s and had accelerated after the coup of 17 March 1970 that overthrew the Head of State, Prince Norodom Sihanouk, and replaced him with a new regime, under the name of the Khmer Republic. Playing on the popularity of Prince Sihanouk (whom the Khmer Rouge would later imprison in his palace once it secured power) and with foreign support, the movement seized large amounts of territory. With the withdrawal, and eventual elimination in 1975, of assistance from the United States of America to the Khmer Republic, the Khmer Rouge was assured of victory.

A. The philosophy and structure of the Khmer Rouge

15. The atrocities committed from 1975 to 1979 were generally not the isolated acts of individual officials, but rather resulted from the deliberate policies of the Communist Party of Kampuchea. The Party proclaimed its victory as ending 2,000 years of subjugation of the Khmer peasantry at the hands of foreign and class enemies. But it continued to see these enemies as an all-pervasive threat to the regime and its dream of a fully independent and socially and ethnically homogeneous Cambodia.

16. To counter the perceived threat and build a "clean social system",[2] the regime launched a uniquely thorough revolution whereby all pre-existing economic, social and cultural institutions were abolished, all foreign influences were expunged and the entire population was transformed into a collective workforce, required to work at breakneck speed to build up the country's economic strength. Meanwhile, the regime acted ruthlessly against all elements suspected of being hostile to the new order. This included those with links to foreign countries, including Viet Nam, which the radically nationalist Communist Party of Kampuchea, like previous Cambodian regimes, feared was seeking to take over the country. The Party hid behind the name of the Angkar Padevat, or "revolutionary organization", until September 1977, and it was not until April 1976 that a new constitution and new state organs were announced and the country was renamed Democratic Kampuchea.

17. To exercise control over the country, the Communist Party of Kampuchea divided it into zones, of which there were seven by 1978, which were in turn divided into approximately 32 sectors. Below the sectors lay districts, sub-districts and cooperatives. Every member of the population was incorporated into an administrative or functional unit led by a committee appointed by the Communist Party of Kampuchea, with most of the population organized into agricultural cooperatives. The centre in Phnom Penh set policy through numerous directives to regional and local officials. Most notably, these directives set the country's basic economic policies and dictated the various purges of elements deemed anti-revolutionary that characterized Democratic Kampuchea. At the same time, the centre did not directly control the workings of many cooperatives and historians differ regarding the degree of effective central control. When Phnom Penh learned that cadres were not implementing its directives or that those policies were failing to remedy the country's problems (most notably in terms of food production), it responded with purges of many thousands of its own officials.

B. The pattern of abuses

18. The years of Democratic Kampuchea were marked by abuses of individual and group human rights on an immense and brutal scale. For purposes of the present report, we group them into four categories.

1. Forced population movements

19. The first priority of the new leadership upon taking power was the forced evacuation of all cities and towns of Cambodia. In the week following its victory, the Government forced 2 to 3 million people out of these areas and into the countryside, sparing neither the aged, sick nor very young. The leadership saw the cities as the breeding grounds of those who threatened their vision of Cambodia - civil and military personnel of the Khmer Republic, foreign (especially Western) sympathizers, the middle class, intellectuals and teachers and other professionals. The emptying of the populations of the cities and towns - termed new people - aimed to dilute the power of those viewed as counterrevolutionaries and would further the Government's plan for a society based primarily on communal agriculture.

20. The evacuation of Phnom Penh was merely the most dramatic example. The soldiers of the Khmer Rouge quickly emptied the capital, which had swelled to some 2 million people owing to the influx of refugees during the war. It is believed that many thousands, especially among the aged and the young, died from lack of food, water and medical assistance during forced marches to the countryside. Witnesses reported numerous instances of hospital patients being dragged from their beds and dying on roads out of the city. By the end of the evacuation, the capital had as few as 20,000 residents.

21. The evacuations of April 1975 were not, however, an isolated occurrence. The Khmer Rouge continued to move people forcibly from village to village, zone to zone, during its years in power.

2. Forced labour and inhumane living conditions

22. The economic system implemented nationwide by the Government of Democratic Kampuchea relied on forced labour. The former town-dwellers joined the rural population in agricultural cooperatives which, by the end of the regime, were intended to embrace entire districts. Cambodians were put onto work teams, often under armed supervision, and forced to grow rice and other crops or construct large-scale infrastructure projects. Work hours were long, often beginning before dawn and continuing on into the night, seven days a week; food rations proved meagre as the country suffered shortages. The labour proved especially traumatic for city-dwellers who had never been exposed to agrarian life. Private property and money virtually disappeared. Attempts to secure additional food or medicine privately were forbidden. The Khmer Rouge organized communal life in a manner designed to obliterate traditional family structures. Meals had to be cooked and eaten communally, not in family groups, and children were separated from families and encouraged to report on any "unreliable" relatives. Marriages required approval of party authorities; clandestine sexual relations could meet with death for both parties.

23. The misery caused by the methods used by the Khmer Rouge in implementing its policy of transforming the Cambodian economy constituted the single largest source of deaths during the Khmer Rouge period. Starvation, disease and physical exhaustion, caused by overwork and inadequate food, medicine and sanitation, killed hundreds of thousands. According to witness reports, the Khmer Rouge overseers also routinely killed many thousands who refused or could no longer work, often murdering their family members as well.

3. Attacks on enemies of the revolution

24. Beyond the many deaths attributable to Democratic Kampuchea's population transfers and forced communization, the regime also targeted certain groups for extermination by virtue of their imputed political beliefs or social or ethnic background. Without recourse to any formal judicial system, virtually every unit of the regime appears to have had the right, even the duty, to identify, detain and execute those believed to be enemies. Among those categories of society regarded with particular suspicion were those listed in paragraphs 25 to 28 below.

25. Officials of the prior regime. Former government leaders, military officers and bureaucrats of the Khmer Republic were immediately targeted for elimination. During the first few months of the regime, thousands were summarily executed, either individually or in large round-ups. Many were killed away from public view, clubbed or shot in isolated fields; some were deliberately murdered in front of their families. By 1977, this purge had extended to the lowest ranks of the Khmer Republic's army as well as to relatives and friends.

26. Ethnic minorities. Together with the general prohibition on religion and any cultural expressions other than the revolutionary model, the Khmer Rouge targeted several ethnic minorities for forced assimilation or worse. The Cham, a Muslim sect present in Cambodia for 500 years, were forcibly dispersed, had their language and customs banned and saw their leaders and others resisting governmental policies killed. Ethnic Chinese, seen as especially associated with the urban capitalist economy, sometimes faced special discrimination. The worst fate of all befell the Vietnamese, many of whom had lived in Cambodia for generations and played an important role in the Cambodian economy. Most were expelled in 1975. By 1977, with the beginning of large-scale fighting with Viet Nam, the regime began killing the few remaining in the country.

27. Teachers, students and other educated elements. The regime saw the educated sectors of the population as part of the corrupt class that had made Cambodia a puppet of outside influences and had exploited the poor peasants, and thus as potential counterrevolutionaries. While many thousands perished in the communes alongside the rest of the population, others were targeted for execution. When identified through trickery or other means, teachers, high school students and professionals were often killed. Cambodians with foreign language proficiencies or ties to foreign countries were considered spies and also killed. Whatever cosmopolitanism had existed in Cambodia's cities disappeared over the next three years.

28. Religious leaders and institutions. In overturning the structures of Khmer society, the Government also aimed its sights at organized religion, including Buddhism, the religion of most Khmers. The regime forced monks to leave the priesthood, killing those who refused. It destroyed numerous Buddhist temples and converted others into storage areas or even prisons, obliterating many sacred objects and texts in the process. As a result, the entire organized priesthood in the country was disbanded. The Government also destroyed hundreds of mosques and many churches.

4. Purges within the Communist Party of Kampuchea

29. The paranoia of the Khmer Rouge regime showed itself most clearly in the treatment of its own cadres. In an ever-expanding purge beginning in late 1976 and continuing until the overthrow of the regime, the leadership looked for enemies within the Party, accusing them of being agents of the CIA, KGB or of Viet Nam. This process involved not only the execution of suspected individuals within the leadership of each unit (including many members of the Government and the Central Committee of the Party), but also the repeated wholesale arrest and

killing of all of the Party cadres in a unit considered treacherous, such as a particular sector or military division.

30. One such attempted purge of the eastern zone in May 1978, led to the largest of several local insurrections during the regime. Military elements in the eastern zone, which borders Viet Nam, rebelled against the capital, leading to prolonged fighting from June through September 1978. The battle was characterized by major human rights abuses by government forces, who may have killed at least 100,000 people in the region, many of them local civilians whom it regarded as having "Khmer bodies with Vietnamese minds".[3] Party cadres, their families and villagers were exterminated. Hundreds of thousands of others were evacuated to points north and west where they died of starvation and disease or were later murdered.

31. It appears that a network of prisons existed throughout the country and down to at least the district level. The principal detention and interrogation centre was established by the leadership's security service, S-21, at the former school at Tuol Sleng in Phnom Penh. Those detained there were invariably interrogated, brutally tortured and then killed. From 1976 to 1978, approximately 20,000 suspected enemies, mostly party cadre and their families, passed through Tuol Sleng; only six are known to have survived.

5. General observations

32. Several general observations can be made regarding the methods used by the Khmer Rouge. First, cadres utilized direct executions against certain specified targets, e.g., members of the Khmer Republic's army and officials of its administration, ethnic Vietnamese, Buddhist leaders, suspected traitors within the party, those transgressing the rules or opposing the regime's policies and certain people in the intelligentsia. Some were murdered after torture sessions or detention. Second, the regime instigated or tolerated massive abuses that led to the deaths of the majority of those who perished during these years. These stemmed from the forced marches, long working hours and insufficient food and medicine experienced by Cambodians, particularly among the "new people".

33. Third, some abuses appear to have occurred without any clearly identifiable pattern. Local cadres, especially children, given authority over people's lives and deaths, often committed atrocities out of irrational hatred or fear. Fourth, not all Cambodians suffered to the same degree. Former Khmer Republic officials and ethnic minorities suffered most, while certain rural populations suffered less. Despite the appalling number of dead (see below), a substantial majority of Cambodians survived this period, although the long-term impact on the country remains incalculable because the educated and skilled were especially targeted and because of the psychological and physical scars left on the survivors.

34. Fifth, identification of the full range of participants and victims in the terror seems impossible. Apart from the meticulous confessions kept in Tuol Slent, either the Khmer Rouge did not compile detailed records of most of their actions of those records appear lost. The names of all the perpetrators and victims will never be known.

35. Finally, scholars and Governments have offered differing totals for the number of Cambodians killed by the Khmer Rouge. Scholars have separately arrived at figures of 1.5 million and nearly 1.7 million.[4] There was a sharp disparity among victim groups. One study posits close to a 100 per cent death rate for rural and urban ethnic Vietnamese, 25 per cent for urban and rural Khmer "new people", and 15 per cent for rural Khmer "base people".[5] Overall, the various estimates point to a death rate of approximately 20 per cent of the April 1975 population of 7.3 to 7.9 million people. Historians of Cambodia have rejected the figure of 2 to 3 million that has often been used by the Governments in Cambodia since 1979, as well as in some popular accounts.

C. Fall of the regime and activities since 1979

36. Cambodia's relations with Viet Nam eventually led to the overthrow of the regime. The alliance of convenience between the Khmer and Vietnamese communists began to wither shortly after their respective victories in the spring of 1975, replaced by the animosity more typical of Khmer-Vietnamese relations historically.

37. From 1975 to 1977, Democratic Kampuchea and Viet Nam engaged in a low-intensity border war. By 1977, Cambodia had escalated the conflict to include raids in which it massacred hundreds of Vietnamese in border villages. Viet Nam eventually responded by sending troops into Cambodia in December 1977. Viet Nam's occupation of parts of the eastern zone prompted the purges of the zone's leaders by the centre, leading to the May 1978 uprising by eastern zone officials. By the summer and fall of 1978, a group of eastern zone leaders had fled to Viet Nam, where they became the core of an opposition group. Viet Nam built up its forces along the Cambodian border and, on 24 December 1978, launched a full-scale invasion of Cambodia. On 6 January 1979, its army reached Phnom Penh and installed the opposition group in power. Later declaring itself the People's Republic of Kampuchea (after 1989, the State of Cambodia), it ruled Cambodia for over a decade with significant support of the Vietnamese army.

38. With the rapid collapse of Democratic Kampuchea, many remaining Khmer Rouge, including the top leadership, fled, re-establishing themselves along both sides of the Cambodian-Thai border. Their abusive methods against those in their zones of control continued (though the scale declined), and they also enjoyed a degree of credibility in the region and elsewhere as the most powerful military opposition to the Vietnamese army. Significant military support from a number of States in the region maintained the Khmer Rouge as an active fighting force. Democratic Kampuchea retained Cambodia's seat in the United Nations during the 1980s (even as word of its atrocities began to become known internationally) owing to an effective anti-Viet Nam coalition led by China, the Association of South-East Asian Nations (ASEAN) and the United States, and supported by many non-aligned nations that placed a premium on condemning aggression against small States.

39. In 1982, as refugees and human rights groups disseminated more information about life in Democratic Kampuchea, the Khmer Rouge's foreign supporters pressured it to join with two non-communist resistance forces to form a coalition government-in-exile, the Coalition Government of Democratic Kampuchea.

Despite the presence in that coalition of two non-communist groups, the United National Front for an Independent, Neutral, Prosperous, and Cooperative Cambodia (FUNCINPEC) and the Khmer People's National Liberation Front, the Khmer Rouge remained the dominant member.

40. The Khmer Rouge battled the Vietnamese throughout the 1980s, but the People's Republic of Kampuchea and Viet Nam managed to maintain control of about 90 per cent of the countryside. Diplomatic efforts to end the conflict bore no fruit during most of the 1980s. In 1987, Indonesia initiated a regional peace process known as the Jakarta informal meetings, and Viet Nam's announcement in early 1989 that it would withdraw its combat forces from Cambodia by September 1989 led to the convening, in July 1989, of the Paris Conference on Cambodia. The Khmer Rouge served as one of four delegations (along with the State of Cambodia, FUNCINPEC and the Khmer People's National Liberation Front) representing Cambodia. After significant diplomatic work on a new peace plan by Australia, the five permanent members of the Security Council and Indonesia during 1990 and 1991, a comprehensive settlement was achieved in the Paris Agreements of 23 October 1991. All four Khmer factions signed on behalf of Cambodia.

41. The peace agreements called for the United Nations Transitional Authority in Cambodia (UNTAC) to organize and conduct elections in an atmosphere of peace and political neutrality. In June 1992, the Khmer Rouge refused to participate in the demobilization process and ceased its cooperation with the United Nations for the remainder of the mission (with the exception of the refugee repatriation process). It boycotted the electoral process and later resorted to massacres of Vietnamese in Cambodia as well as limited attacks on UNTAC. Since 1993, however, the Khmer Rouge has effectively ceased to be an active fighting force, with its soldiers returning to civilian life or joining the national army. On 7 July 1994, the national legislature passed a law outlawing the Khmer Rouge.

D. The absence of accountability to date

42. During the Khmer Rouge's reign, the international community exercised virtually no scrutiny of the Khmer Rouge. Lack of information owing to the regime's autarkic nature, the exhaustion of interest of many States in Indochina and the unwillingness of others to question a new revolutionary government's human rights practices all kept Cambodia away from the spotlight. The United Nations Commission on Human Rights eventually considered the issue in 1978, when a group of Western States brought reports from fleeing refugees to the attention of its Subcommission on Prevention of Discrimination and Protection of Minorities. This led to the only official United Nations report on the period, by the Subcommission's Chairman.[6] The Commission did not consider this report because of the fall of the Khmer Rouge Government.

43. Following the Khmer Rouge's overthrow, the People's Republic of Kampuchea, in 1979, conducted trials *in absentia* of Pol Pot and Ieng Sary. These trials, however, were mere show trials with no regard for due process. Outside Cambodia, the same political forces that ensured that Democratic Kampuchea retained its seat at the United Nations also ensured that no action would be taken in that body regarding accountability of the Khmer Rouge leaders. During

the negotiation of the Paris Accords, the Khmer Rouge served as a full participant; and those agreements contained no explicit obligation on Cambodia to conduct trials, nor was UNTAC given that mandate. Instead, the States participating in the peace process left the issue for the future Cambodian Government.

44. Since the 1993 elections, the Government has engaged in a campaign to obtain the defection of Khmer Rouge guerrillas through offers of non-prosecution under the 1994 law outlawing the Khmer Rouge and integration into the Royal Cambodian Armed Forces. This policy, combined with the end to foreign military assistance to the Khmer Rouge and a series of splits within the movement, has resulted in the surrender and defection of almost the entire Khmer Rouge army and the end to its insurgency. In September 1996, the Cambodian Government provided an amnesty to Ieng Sary, a former Deputy Prime Minister in the Democratic Kampuchea Government, covering his 1979 conviction and the 1994 law. The amnesty, as well as permitting the former Khmer Rouge units to retain their weapons and to continue to control these areas, also formed the deal by which Khmer Rouge forces loyal to him and the territories they control were formally brought within the Government. The same model of integration, albeit without formal amnesties, was used with other Khmer Rouge areas.

45. The death of Pol Pot in 1998 shifted attention to the fate of the remaining Khmer Rouge leaders. In December 1998, two of Democratic Kampuchea's most senior officials, Nuon Chea and Khieu Samphan, also surrendered. On 12 February 1999, the Government incorporated what it termed the last remnants of the Khmer Rouge into the Royal Cambodian Armed Forces. Only one senior leader, popularly known as Ta Mok, has yet to formally surrender to the Government as of the date of this report. Despite widespread knowledge of the whereabouts of Khmer Rouge officials, none has over the years been apprehended or brought before a court on criminal charges relating to their years in power.

IV. EVALUATION OF THE EVIDENCE

46. The first part of the mandate of the Group of Experts is to evaluate the existing evidence with a view to determining the nature of the crimes committed by Khmer Rouge leaders in the years from 1975 to 1979. This section is the Group's evaluation of the evidence; the following section addresses the nature of the crimes committed.

A. General comments

47. It is now 20 years since the ouster of the Khmer Rouge from power in Cambodia, and the length of time since their atrocities has created an immediate difficulty in bringing its leaders to justice. This manifests itself in a number of ways, including the death of potential witnesses as well as the difficulty for surviving witnesses to recall particular events of the period, in addition to the decay and loss of physical evidence. Nevertheless, trials and convictions for serious human rights violations have been held in a number of countries despite long passages of time; these include trials by the Federal Republic of Germany of Nazis in the 1960s and trials by France of Nazis in the

1980s and 1990s. The passage of time is thus not, in itself, a bar to accountability or justice. Indeed, the importance of keeping the door open to accountability, despite the passage of time, lies behind the elimination of statutes of limitation in many States for certain international crimes, the call for such elimination in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968,[7] and the exclusion of crimes within the jurisdiction of the International Criminal Court from such statutes of limitation.[8]

48. The absence of any organized attempts at accountability for Khmer Rouge officials has led to a delay in efforts to preserve evidence that might be useful for legal proceedings. Over the last 20 years, various attempts have been made to gather evidence of Khmer Rouge atrocities to build a historical record of these acts. For nearly 20 years, scholars have been accumulating such evidence by talking with survivors and participants in the terror and reviewing documents, photographs and gravesites. The most impressive and organized effort in this regard is that of the Documentation Center of Cambodia, located in Phnom Penh. Originally set up by Yale University through a grant from the Government of the United States of America, the Center now functions as an independent research institute with funding from several Governments and foundations. It has conducted a documentation project to collect, catalogue, and store documents of Democratic Kampuchea, as well as a mapping project to locate sites of execution centres and mass graves.

49. Nevertheless, it is essential to note that neither the Documentation Center nor other research efforts have been oriented towards investigation in preparation for prosecution of particular individuals. While their efforts provide critical background and details of the events in Democratic Kampuchea, they may well, in themselves, not be sufficient to build a case against particular individuals.

50. The Group viewed its mandate as reviewing the evidence for purposes of determining whether sufficient evidence exists now or could be gathered in the future to justify bringing to trial certain leaders of the Khmer Rouge. Its task was thus neither to review the existing evidence to make judgements regarding the involvement of particular individuals, nor to gather evidence itself regarding the involvement of individuals.

51. In light of the above, we now review the two forms of evidence that would be pertinent in legal proceedings against Khmer Rouge leaders: physical evidence and witnesses.

B. Physical evidence

52. The physical evidence most relevant for any legal proceedings can be divided into three categories: human remains, structures and mechanical objects and documents. With respect to human remains, the Documentation Center has located many thousands of execution sites and burial pits. (During its mission to Cambodia, the Group visited one execution site and makeshift memorial at Trapeang Sva village in Kandal Province.) Although many human bones are in a state of decay, the violent method of death can be determined in a large number

of cases. Structural/mechanical evidence consists of buildings around the country used as detention, torture and killing centres, as well as the physical instruments associated with the operation of such centres. The best known of these centres is at Tuol Sleng in Phnom Penh, which was converted to a museum in the early 1980s, and which the Group also visited. Smaller such centres can be found in other parts of the country. The physical implements still extant vary in their state of preservation.

53. Documentary evidence consists of internal documents of the regime of Democratic Kampuchea that demonstrate the role of particular individuals in serious human rights abuses. Within Cambodia, such documents can be found at the Documentation Center, the National Archives, the Tuol Sleng Museum and the Ministry of the Interior. In addition, the Group was informed that the People's Army of Viet Nam removed documents of Democratic Kampuchea from Phnom Penh following its occupation of the city. Finally, the Group was informed that other documents may be in the hands of individual Cambodians or foreign researchers.

54. The Group reviewed documents at the Documentation Center, which appears to have the most comprehensive set of such documents, and also received a set of binders from the Center containing excerpts from the most pertinent documents. The Group also visited the National Archives but the relevant documents it read there were not original documents of Democratic Kampuchea, but rather reports and statements about Democratic Kampuchea that were presented at the trial in absentia of Pol Pot and Ieng Sary in 1979. While the materials in these documents might be useful in renewed legal proceedings, they are not original documentary evidence. Copies of the most relevant documents of the Tuol Sleng Museum are available at the Documentation Center.

55. The original documents reviewed by the Group provide critical evidence regarding the pattern of human rights abuses in Democratic Kampuchea. This includes the details of the various administrative bureaucracies in the country (government, military and party), the situation in various regions regarding agricultural production and popular livelihood and efforts undertaken against enemies of the regime. As for the documentary record that clearly points to the role of specific individuals as immediate participants or as superiors, it appears quite extensive for some atrocities, most notably the operation of the interrogation centre at Tuol Sleng. For other atrocities, documentary evidence that directly implicates individuals, whether at the senior governmental level or the regional or local level, is currently not available and may never be found given the uneven nature of record-keeping in Democratic Kampuchea and the apparent loss of many documents since 1979.

C. Witness evidence

56. As has been shown in domestic and international trials of human rights abusers since the Second World War, credible witness testimony usually proves essential to successful prosecutions. In the case of Cambodia, much of the country was witness to one atrocity or another, whether the evacuation of the cities, forced labour, or actual executions of those unwilling to cooperate with the regime. As with the physical evidence, however, a distinction must be drawn

between testimony as to the existence of certain atrocities and testimony linking specific individuals to them. Based on our interviews with Cambodians and other research, the Group believes that witnesses who can testify to the occurrence of atrocities and the identity of individuals who carried them out can be located with relative ease. The more difficult question is whether witnesses can be located who can testify to the role of Khmer Rouge leaders in procuring the occurrence of atrocities, as such leaders are likely to be the targets of investigations and trials (an issue we discuss in greater detail in section VII.A. below). This would necessitate locating persons who witnessed the activities of Khmer Rouge leaders (as opposed to much lower-level officials who may have actually carried out atrocities) and could testify as to their knowledge and the orders they gave.

57. A further complicating factor with respect to witnesses is the necessity of ensuring that their testimony is truthful and the product of neither a desire to mislead the court nor of fear of repercussions for what they say. The Group believes that any mechanism for accountability will need to include provision for witness protection, and we discuss this issue further in section X.C, below. For present purposes, however, it is our view that the problem of ensuring the credibility and safety of witnesses is not an insurmountable obstacle to the creation of a legal mechanism for the prosecution of the Khmer Rouge.

D. Conclusions

58. The Group is able to draw two distinct conclusions. First, the evidence gathered to date by researchers, scholars, the Documentation Center and others makes clear the commission of serious crimes under international and Cambodian law. This conclusion is further elaborated in our analysis of the relevant criminal law in section V below. Second, the Group is of the opinion that sufficient physical and witness evidence currently exists or could be located in Cambodia, Viet Nam, or elsewhere to justify legal proceedings against Khmer Rouge leaders for these crimes. This will require a significant investment of time by skilled investigators, but we do not believe the state of the evidence is any bar to prosecutions. The ultimate utility of particular evidence will depend upon the rules of evidence and procedure adopted by any tribunal, an issue we return to in section X.B. below.

V. CRIMINAL NATURE OF ACTS COMMITTED

59. In the light of the record compiled by historians and the physical and documentary evidence gathered to date, it is now necessary to turn to the substantive law involving criminal responsibility for the acts described above. Such a review is necessary in making recommendations as to the jurisdiction of any entity established for holding Khmer Rouge officials accountable for their acts.

60. Before addressing the relevant law, three preliminary points deserve mention. First, with respect to both international law and domestic law, the strictures of nullum crimen sine lege - the general principle of law prohibiting the assigning of guilt for acts not considered as crimes when committed -

dictate inquiry into the international and domestic law in force in 1975, at the start of the Khmer Rouge's rule, rather than that in effect today. Second, any review of the law in a report such as this is oriented only towards determining whether the evidence justifies, as a legal matter, the inclusion of certain crimes within the jurisdiction of a court that would try Khmer Rouge leaders. It does not reach conclusions on whether enough evidence is available to indict particular individuals, let alone whether the evidence justifies a finding of guilt. Definitive findings concerning the guilt of individuals require an examination of detailed evidence deemed admissible by a particular forum regarding precise events and the role of individual actors in them. Third, this section does not make recommendations regarding which crimes should be included in the jurisdiction of a tribunal, but only as to which crimes appear to us legally justifiable for inclusion. Our recommendations regarding that question turn on the type of tribunal that is established and we reserve those issues for later in the report.

A. Acts incurring individual criminal responsibility under international law

1. Genocide

61. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide declares genocide a crime under international law and obligates States to punish genocide that takes place on their territory. The Convention's definition of genocide has three main elements:

(a) The accused must undertake one of a series of acts - killing, causing serious bodily or mental harm; deliberately inflicting conditions of life calculated to bring about physical destruction; imposing measures intended to prevent births; and forcibly transferring children from the group;

(b) The accused must do so against a "national, ethnical, racial or religious group";

(c) The accused must do these acts "with intent to destroy, in whole or in part," one of these groups "as such".[9]

62. Cambodia has been a party to the Convention, without reservation, since the Convention's entry into force in 1951.[10] Democratic Kampuchea never, it appears, denounced the Convention when in power. During the Khmer Rouge years, it appears that the Government subjected the people of Cambodia to almost all of the acts enumerated in the Convention. The more difficult task is determining whether the Khmer Rouge carried out these acts with the requisite intent and against groups protected by the Convention.

63. In the view of the Group of Experts, the existing historical research justifies including genocide within the jurisdiction of a tribunal to prosecute Khmer Rouge leaders. In particular, evidence suggests the need for prosecutors to investigate the commission of genocide against the Cham, Vietnamese and other minority groups, and the Buddhist monkhood.[11] The Khmer Rouge subjected these groups to an especially harsh and extensive measure of the acts enumerated in

the Convention. The requisite intent has support in direct and indirect evidence, including Khmer Rouge statements, eyewitness accounts and the nature and number of victims in each group, both in absolute terms and in proportion to each group's total population.[12] These groups qualify as protected groups under the Convention: the Muslim Cham as an ethnic and religious group; the Vietnamese communities as an ethnic and, perhaps, a racial group; and the Buddhist monkhood as a religious group.

64. Specifically, in the case of the Buddhist monkhood, their intent is evidenced by the Khmer Rouge's intensely hostile statements towards religion, and the monkhood in particular; the Khmer Rouge's policies to eradicate the physical and ritualistic aspects of the Buddhist religion; the disrobing of monks and abolition of the monkhood; the number of victims; and the executions of Buddhist leaders and recalcitrant monks. Likewise, in addition to the number of victims, the intent to destroy the Cham and other ethnic minorities appears evidenced by such Khmer Rouge actions as their announced policy of homogenization, the total prohibition of these groups' distinctive cultural traits, their dispersal among the general population and the execution of their leadership.[13]

65. As for atrocities committed against the general Cambodian population, some commentators have asserted that the Khmer Rouge committed genocide against the Khmer national group, intending to destroy a part of it.[14] The Khmer people of Cambodia do constitute a national group within the meaning of the Convention. However, whether the Khmer Rouge committed genocide with respect to part of the Khmer national group turns on complex interpretive issues, especially concerning the Khmer Rouge's intent with respect to its non-minority-group victims. The Group does not take a position on this issue, but believes that any tribunal will have to address this question should Khmer Rouge officials be charged with genocide against the Khmer national group.

2. Crimes against humanity

66. Crimes against humanity have been defined in various ways in important international documents - in the Charter of the International Military Tribunal, Allied Control Council Law No. 10, the statutes of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, the International Law Commission's 1996 Draft Code of Crimes Against the Peace and Security of Mankind and, most recently, the Rome statute of the International Criminal Court. Nevertheless, it is possible to discern five major elements that have appeared in one or more - though certainly not all - of the definitions:

(a) The acts must involve one or more of a list of serious assaults on the individual, including murder, extermination, deportation, enslavement, forced labour, imprisonment, torture, rape, other inhumane acts and various types of persecutions;

(b) Those acts must be of a mass or systematic nature against a civilian population;

(c) The acts must be committed with a discriminatory motive based on the race, religion, political viewpoint or other attribute of the population;

(d) The acts must involve governmental action;

(e) The acts must be committed in the course of armed conflict.

As noted above, the accountability of the Khmer Rouge must be determined in light of the law as of 1975, regardless of developments in international law since then.

67. As for the acts committed (factor a above), the historical and evidentiary record suggests cases of murder (rising to the level of extermination of political opposition), forced labour, torture and other inhumane acts. Regarding forcible transfers of population, the evidence suggests a cruel and unlawful means of accomplishing the plan, as well as an unjustifiable purpose aimed against the urban dwellers.

68. As for the mass or systematic nature of those acts (factor b above), many of the acts appeared part of a deliberate, widely known governmental policy. At the same time, some have argued that many atrocities, especially those in outlying areas, lacked direction and amounted effectively to random cruelty.[15] If, however, governmental nonfeasance in the face of such acts were motivated by animosity towards the victims' political or other status, it would seem equivalent to systematicity.

69. Regarding motivation (factor c above) - or animus towards the victim - under some important legal instruments defining crimes against humanity, motive is irrelevant for certain grave assaults on the person, such as murder or torture, so that many acts of the Khmer Rouge, even against those not seen as political enemies, would be covered.[16] Even if motive were to form an element for all crimes against humanity, the political viewpoint of the victims is included among the listed motives and this element appears to be satisfied regarding many acts of the regime. These include atrocities against the hundreds of thousands of people, if not more, regarded as political enemies by the regime. The acts against the Cham, Vietnamese and other minorities would qualify as crimes against humanity without the need to demonstrate, as required in the Genocide Convention, that the regime intended to destroy them.

70. As for State action (factor d above),[17] it would seem to follow from evidence of systematicity, since only the Government of Democratic Kampuchea had the control of the country needed to engage in these acts. Actions by regional authorities would also qualify, as would the implementation of policies through party channels, rather than formal state agencies, since the party controlled the State.

71. Finally, the requirement of a nexus to armed conflict (factor e above) began with the Nuremberg Charter and was confirmed by both the International Military Tribunal and some of the Allied Control Council Law No. 10 courts.[18] A very significant change in the law since 1945 is the elimination of the nexus in contemporary definitions of crimes against humanity.[17] Were that nexus still required as of 1975, the vast majority of the Khmer Rouge's atrocities would not

be crimes against humanity; historians have not linked the bulk of the atrocities of the Khmer Rouge to the armed conflicts in which it engaged (with Viet Nam or domestic rebels such as those in the eastern zone), except to point out that the Khmer Rouge leadership's concept of self-reliance included an overall hatred of foreign and Vietnamese elements that they manifested in numerous ways, including killing many people accused of being agents of Viet Nam.[19] However, the Group believes that, for the purpose of considering the jurisdiction of any tribunal that would prosecute Khmer Rouge officials, the inclusion of crimes against humanity is legally justified. The bond between crimes against humanity and armed conflict appears to have been severed by 1975. Several key developments since the Second World War point to such a movement. First, the views of States during the drafting of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity[7] suggest that the nexus was not necessary.[20] Second, the International Law Commission dropped the nexus to armed conflict in its 1954 Draft Code of Offenses Against the Peace and Security of Mankind.[21] The trends that have now solidified were well in place by 1975, so that a prosecution of Khmer Rouge leaders for such violations would not violate a fair and reasonable reading of the nullum crimen principle.

3. War crimes

72. This area of law remains pertinent because certain Khmer Rouge atrocities took place in the course of warfare with other States, especially Viet Nam, as well as with certain domestic resistance forces, primarily during their last year and a half in power. At the same time, this aspect of Khmer Rouge activity constituted only a small portion of their human rights abuses.

73. Cambodia, Laos, Thailand and Viet Nam were parties to all four Geneva Conventions of 1949 during the period at issue, although none became a party to the 1977 Additional Protocols before 1980.[22] The grave breaches of the provisions of the Geneva Conventions thus apply, although criminality extended beyond these grave breaches under the customary law of the time. The historical record suggests that armed conflict between Viet Nam and Cambodia began by September 1977, and most likely earlier. The border skirmishes in May 1975 and the continuation of incidents make a strong case for the applicability of the Conventions in relations between Cambodia and Viet Nam during nearly the entirety of Democratic Kampuchea's rule.[23] The grave breaches provisions of the Geneva Conventions also only apply to acts taken against "protected persons or property". In the First and Second Geneva Conventions, these are wounded and sick members of the armed forces, broadly defined; and in the Third Convention, prisoners of war.[24] The exact nature of Khmer Rouge acts against members of the armed forces is not, however, well documented, although it is known that some captured Vietnamese soldiers were interrogated and killed at Tuol Sleng. The Fourth Geneva Convention protects civilians who find themselves in the hands of a party to the conflict or of an occupying power of which they are not nationals.[25] This would include Vietnamese in Viet Nam as well as in Cambodia during the armed conflict. As most ethnic Vietnamese in Cambodia were residents rather than Cambodian citizens, the Conventions would protect them.[26]

74. The acts against Vietnamese in Viet Nam and Cambodia seem to meet the standard of grave breaches under article 147 of the Fourth Geneva Convention and are thus war crimes. In particular, the Cambodian army appears to have committed wilful killing, torture or inhuman treatment, wilful causing of great suffering, unlawful deportation or confinement and extensive destruction of property. Article 147 would also apply to massacres of Thai villagers by Khmer Rouge troops during repeated border clashes with Thailand. Beyond the Geneva Conventions, the record also suggests commission of other crimes that violate the laws or customs of war, such as wanton destruction of towns and plunder of public or private property. War crimes could thus, as a legal matter, be included in the jurisdiction of a tribunal to try Khmer Rouge leaders.

75. As for international humanitarian law governing internal conflict, the only relevant treaty provision in effect during the Khmer Rouge years was common article 3 of the Geneva Conventions of 1949. Violations thereof are not grave breaches of the Conventions, and do not appear to have been viewed as war crimes under customary law as of 1975.[27] This was two years before the International Committee of the Red Cross completed its first detailed elaboration of the laws of war in internal conflicts (i.e., Additional Protocol II of 1977); the fairly recent development of the law on this issue and the lack of any provisions in Protocol II for criminality suggest that criminality was not accepted at that time. As for criminality of other violations of the laws and customs of war in internal conflicts, even if, as the International Tribunal for the Former Yugoslavia held in the Tadić case, customary law recognized such criminality by the time of the Yugoslavia war.[28] This does not suggest, for the reasons noted above, that criminality was recognized 15 years earlier. It is thus more difficult to characterize the acts during the internal conflict as war crimes under the law at that time.

4. Other acts incurring individual responsibility

76. Destruction of cultural property incurs individual criminal responsibility under the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, to which Cambodia has been a party since 1962.[29] The Convention's nexus to armed conflict means, however, that despite the record of such destruction as part of their systematic attack upon religion,[30] only desecrations in connection with Cambodia's conflict with Viet Nam (or perhaps also of an internal conflict) would trigger criminal responsibility.[31] Additional evidence would need to be gathered on this question.

77. Forced labour incurs individual criminal responsibility under the 1930 Convention on Forced Labour, to which Cambodia was a party during the Khmer Rouge period.[32] The 1930 Convention criminalizes forced labour not conforming to certain limitations on age, number of days of work, working hours, non-transfer to areas dangerous to health and access to medical care. The regime disregarded the special requirements for forced labour in connection with public works, such as the ban on removal from the place of residence and due regard for religion and social life.[33] These acts also do not appear to fall within the exceptions to the definition for labour that is part of the "normal civic obligations" of citizens except under the most twisted meaning of that term.[34] Nor do they fall under the exception for work "exacted in cases of emergency":[35] even assuming a

worst case scenario of massive food shortages, this would not justify the forced labour of the bulk of the population in the countryside, particularly in light of the regime's refusal to accept much foreign aid.[36] Thus, this crime could also be included in a court's jurisdiction.

78. Torture incurs individual criminal responsibility today under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, but that convention was not concluded until 1984.[37] As for the criminality of torture under customary international laws of the time of the Khmer Rouge's atrocities, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights prohibit torture, and the latter requires States to give effect to the right of persons not to be subjected to it.[38] The 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment declares torture "an offence to human dignity" that States must make a crime under their law. It defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons".[39] Its adoption by consensus by the General Assembly offers evidence of an emerging norm of international criminality as of 1975. The historical record clearly points to Democratic Kampuchea's commission of torture routinely against tens of thousands of supposed enemies of the regime. Although a court might have to examine closely whether the criminality of torture as of 1975 met the standards of nullum crimen sine lege, the inclusion of torture in the statute of any court seems justified.

79. Lastly, the Khmer Rouge leaders and cadre appear to have committed at least one other crime on a far smaller scale - crimes against internationally protected persons.[40] In April 1975, the regime detained personnel in the French embassy and then removed and murdered Cambodian husbands of foreign diplomatic personnel.[41]

5. Extent of individual responsibility

80. International law has long recognized that persons are responsible for acts even if they did not directly commit them. This principle has appeared in various instruments that declare individuals responsible if they plan, instigate, order, aid or abet or conspire to commit the crimes.[42] One interpretive problem with these instruments is the lack of uniformity among legal systems for defining these terms. In the case of the Khmer Rouge, those contemplating prosecutions will need to make key decisions regarding the scope of investigations, as the atrocities were committed by very large numbers of people with varying levels of governmental authority.

81. Military commanders and civilian leaders are criminally responsible in the obvious case where they order atrocities and they are also generally responsible if they knew or should have known that atrocities were being or about to be committed by their subordinates and they failed to prevent, stop or punish them.[43] This would suggest the need to investigate the roles of those Khmer

Rouge officials in responsible governmental positions with actual or constructive knowledge of the atrocities.

82. The converse of the extension of guilt beyond those who actually commit atrocities is the possibility that those who do commit them may under some circumstances be exculpated based on a legitimate defence stemming from the lack of a "moral choice" in committing the act.[44] Although following orders per se is an unacceptable defence,[45] international criminal law has recognized other possible defences. Generally speaking, these include (a) duress or coercion (based on imminent threat or serious bodily harm), (b) mental defect, (c) self-defence, and (d) failure to understand that a governmental directive is illegal unless the order was manifestly unlawful.[46]

83. In the case of Cambodia, some Khmer Rouge offenders, especially those at lower-levels facing threats from other cadre, might benefit from a defence of coercion. In addition, many low-ranking Khmer Rouge actors, especially minors, presumably could not have known of the illegality of some of their orders under prior Cambodian law or international law (especially as the Democratic Kampuchea regime emphasized the new beginning for the country). This would, however, only apply to lesser offences, and not those crimes that are so patently atrocious that such ignorance is never an excuse. In situations where lack of knowledge of the law is not a defence, following orders might, however, be used to mitigate punishment.[46] As affirmed at Nuremberg, leaders would be held to have known of the criminality of their acts vis-à-vis earlier Cambodian law or international law. These legal factors are relevant to our recommendations below regarding the appropriate targets of inquiry for any court.

B. Crimes under Cambodian law

84. Crimes under domestic law will generally lack the special elements of many international crimes and thus generally be easier to prove. However, in the case of Cambodia, two obstacles make the task complex. First, the sources on Cambodian law are extremely scarce. The primary source of criminal law prior to the Khmer Rouge period is the 1956 Code Pénal et Lois Pénales, published by the Ministry of Justice of the Kingdom of Cambodia, though it appears that no sources reliably and comprehensively update this law through 1975.[47] As for subsequent law that might govern the Khmer Rouge years, Democratic Kampuchea appears to have published none. No secondary sources on Cambodian criminal law appear extant. Second, because Cambodia has seen at least six legal regimes since independence, the extent to which the law of the prior regimes has remained in force is simply undetermined in many cases.[48]

85. At a minimum, then, the Group assumes, based on the principle of nullum crimen sine lege, that pre-1975 Cambodian criminal law represents the primary domestic law concerning the Khmer Rouge for acts committed from 1975 to 1979.[49] Even though Cambodian courts have not applied the 1956 law for a generation, it would remain the primary source of law for domestic prosecutions. Implicit in this assumption is that the major crimes in the 1956 criminal code remained crimes during the subsequent years. This seems the case during the later years of the Kingdom of Cambodia and the Khmer Republic. As for the effect of the Khmer Rouge period, no evidence suggests that Democratic Kampuchea formally

repealed or denounced the criminal law in effect at the time it took power. Although Democratic Kampuchea clearly intended to create a new beginning ("Year Zero") in Cambodia, it cannot be assumed that the regime eliminated the criminality of egregious acts regarded as crimes by all States. Moreover, even an explicit denunciation would not per se insulate the Khmer Rouge's acts from criminality under earlier Cambodian law, especially if the regime sought to justify violations of the most basic protections of human dignity.[50]

1. Principal crimes

86. The 1956 Penal Code covers the primary crimes recognized by most States. According to French practice, the code classifies offences by severity into crimes (felonies); délits (misdemeanours); and contraventions (police infractions). Felonies and misdemeanours are further qualified as first, second or third degree in increasing order of severity according to their degree of punishment.[51] Felonies were punishable by peines criminelles: those of the third degree were punishable by death; second-degree felonies were punishable by life at forced labour; and first-degree felonies were punishable by forced labour for a limited period. Misdemeanours were punishable by peines correctionnelles, namely imprisonment, fines or both, each increasing based on the degree of the misdemeanour. Police infractions were punishable by peines de simple police, namely police detention, police fines or both.[52]

The most relevant crimes under Cambodian law may be summarized as follows:

- Homicide (articles 501-508);
- Torture (article 500);
- Rape (articles 443-46);
- Other physical assaults (articles 494-99);
- Arbitrary arrest or detention (articles 482-86);
- Attacks on religion (articles 209-18);
- Other abuses of governmental authority (articles 240-44).

In addition to the above offences, the Code of Military Justice, published along with the Penal Code, provides for additional crimes when committed by military personnel. The crimes and punishments are generally defined along the same lines as those in the Penal Code.[53]

87. The 1956 Code does not mention international offences such as genocide, crimes against humanity or war crimes per se. Whether Cambodian law permits direct prosecution of individuals for international crimes absent codification of those crimes in the penal code remains unresolved.[54]

88. The atrocities committed by the Khmer Rouge appear to meet the general definitions of the various crimes in the Cambodian Penal Code of 1956 such as to

justify, as a legal matter, their inclusion in the jurisdiction of a court trying the Khmer Rouge. These include murder, torture, rape, unlawful detention, other physical assaults, attacks on religion and other abuses of governmental authority. Because these are crimes under Cambodian law, prosecutors would not need to prove the additional elements for international offences, such as an intent to destroy groups (genocide), systematicity or scale (crimes against humanity) or link to armed conflict (war crimes).

2. Extent of individual criminal responsibility

89. The Penal Code provides for responsibility for various related crimes, such as aiding and abetting and attempts.[55] It also provides a listing of defences from guilt including insanity, youth, force majeure, superior orders and self-defence.[56] As a result, youthful offenders may well be exempt from any culpability, especially given the total control and atmosphere of terror and siege that gripped the country during the Khmer Rouge years. Moreover, the exact status of the force majeure defence will require elaboration, as will the scope of the superior orders defence.

90. Lastly, the Penal Code provides for statutes of limitations - ten years for felonies, five years for misdemeanours and one year for police infractions. These run from the date of commission and are interrupted by any judicially ordered investigation.[57] One interpretation would thus bar any prosecutions for atrocities committed from 1975 to 1979 after January 1989, ten years from the Khmer Rouge's loss of governmental power. Crimes committed before 1979 would have had to have been investigated or prosecuted before 1989. However, based on precedents in European States that prosecuted Nazi offenders after the apparent expiration of the prior statue of limitations - in particular Germany and France in the 1960s and 1980s - other options remain available to Cambodia. First, the National Assembly could repeal the statutes of limitations, and do so notwithstanding the fact that the limitation period had already expired. Second, the National Assembly could suspend the application of the statute from 1975 to the present on the ground that the judiciary has not been fully functioning.[58]

C. Conclusions

91. Based on our review of the law and available evidence, the Group believes that it is legally justifiable to include in the jurisdiction of a tribunal that would try Khmer Rouge leaders for acts during the period from 1975 to 1979 the following crimes: crimes against humanity, genocide, war crimes, forced labour, torture and crimes against internationally protected persons, as well as the crimes under Cambodian law noted above. Such a tribunal would also need to take account of the principles regarding individual criminal responsibility discussed above, in particular command responsibility and the availability of certain defences. The Group's further views as to whether all of these crimes should in fact be placed within the jurisdiction of the tribunal that we recommend are elaborated in section VIII.B.2 below.

VI. THE KHMER ROUGE IN CONTEMPORARY CAMBODIAN POLITICS AND SOCIETY

92. The sections of our report until this point have been primarily historical, legal and technical in nature. At this point, however, our study examines the feasibility of bringing Khmer Rouge leaders to justice and makes recommendations about the optimal ways to accomplish this. In our analysis and recommendations, the members of the Group cannot act as legal experts in a vacuum. Rather, we must take account of special political factors unique to Cambodia, and, in particular, the views of the Cambodian people and the role of the Khmer Rouge in Cambodian domestic politics. These factors closely inform the sections that follow and are worthy of elaboration at this point.

A. Views of the Government and people of Cambodia

93. Any report such as this must proceed from the starting point of the views of the Cambodian people and their Government. It is worth reiterating that the Group of Experts was created as a response to the request of the Cambodian Government. In our meetings with Cambodian officials, all reaffirmed their support for criminal trials of Khmer Rouge leaders. This was stated to us unequivocally at the highest levels by Hun Sen, now the Prime Minister, and Norodom Ranariddh, now the Chairman of the National Assembly. Although the Group was, unfortunately, unable to meet with King Sihanouk, who had left Cambodia for medical treatment, we note that the King has expressed his strong support for putting Khmer Rouge leaders on trial and a judicial accounting of the period from 1975 to 1979. In late 1998, for instance, he stated, "An international tribunal would have the perfect right to take up the case of genocide in Cambodia because it concerns crimes against humanity and that concerns the conscience of the world community".[59] And, although the Group was also unable to meet with the leader of the parliamentary opposition, Sam Rainsy, who was outside Cambodia at the time of our visit, he too has publicly expressed support for a trial of Khmer Rouge leaders on many occasions.

94. As for Cambodian public opinion, in the 20 years since the ouster of the Khmer Rouge, no systematic polling has been taken on the question of Khmer Rouge accountability.[60] Instead, the Group has relied upon the views expressed to us - some purely personal, others claiming to be based on an assessment of Cambodian public opinion - by persons with whom we met in Cambodia and elsewhere, as well as other anecdotal evidence. From our consultations with Cambodians in and out of Government, we heard an unambiguous demand for trials. All spoke of the importance of justice for peace, stability and national reconciliation. This responded to some concerns the Group initially had as to whether Cambodians might view, in the particular circumstances of their country, criminal accountability as inconsistent with the attainment of social tranquillity and a stable democracy. As one of our most senior Cambodian governmental interlocutors told us, "Justice is one of the components of democracy". Others spoke forcefully about the consistency between justice for massive atrocities and the tenets of Buddhism so deeply engrained in Cambodian society. A statement of 13 November 1998 by Cambodia's leading non-governmental organizations called for trials "both for the reconciliation and healing of the

Cambodian people, and as a warning to those who violate human rights that they will not escape the punishment they deserve".

B. Relationships between the current political parties and the Khmer Rouge

95. Although the Khmer Rouge are now spent as a fighting force and their supreme leader is dead, the movement's history, politics, and personnel are still in many senses central to Cambodian domestic politics. In the course of its work, the Group became acutely aware that any option to bring Khmer Rouge leaders to justice must be undertaken with a full understanding of the current political situation in Cambodia. Its unique agglomeration of political forces renders the Cambodian context impervious to simple solutions.

96. First, both of the principal political parties have over the years had strong connections with the Khmer Rouge and include former Khmer Rouge among their members, including some who might be targets of any investigation into atrocities in the 1970s. The current Prime Minister and many of his colleagues in the Cambodian People's Party were once members of the Khmer Rouge before defecting to Viet Nam, although we have no reason to believe that the Prime Minister would be the subject of the legal proceedings that are within our mandate and that we recommend. Similarly, FUNCINPEC and other parties were closely allied with the Khmer Rouge in the struggle against Viet Nam and the People's Republic of Kampuchea/State of Cambodia. This factor forms part of the context in which options for prosecution must be considered.

97. Second, both of the principal political parties have sought the support of former members of the Khmer Rouge and of the people in the areas they control. (Despite all its atrocities, the Khmer Rouge are still respected by many Cambodians for their staunch nationalism and, in particular, their vehement opposition to foreign - particularly Vietnamese - influences.) The Government has stated that its priority is to end the military threat from the movement. As discussed above, part of the Government's strategy in this regard has been to grant de facto amnesties to all former Khmer Rouge for their post-1979 activities under ordinary criminal law or the 1994 law outlawing the Khmer Rouge (except in one case involving the killing of foreign nationals), as well as to abstain from prosecuting Khmer Rouge leaders for crimes during the period of Democratic Kampuchea. Insofar as fair and impartial justice requires independent decisions on whom to indict and to convict free of political pressure, this strategy may prove an obstacle.

98. Third, the Cambodian People's Party, which has basically governed Cambodia since 1979, has sought popular support through its link to the ouster of the Khmer Rouge and the ending of the movement's threat to the country. At the same time, however, the Government has, for a generation, asserted its own official view as to who was responsible for the atrocities of Democratic Kampuchea, summarized in the phrase "Pol Pot-Ieng Sary genocidal clique", a term used at the in absentia trials of 1979. To the extent that fair trials may reveal a different historical picture from that asserted by the Cambodian People's Party, with the involvement of additional people, the Government may have concerns about a tribunal over which it does not exercise control.

C. Perceived threats to Cambodia from accountability

99. We also wish to respond to the view that Cambodia needs to move forward and no longer look at its past. This was a distinctly minority view during our visit to Cambodia (and non-existent among the Cambodians with whom we spoke). One answer would simply be that crimes such as those of the Khmer Rouge deserve punishment as a matter of morality and fundamental considerations of justice. Those arguing against accountability may accept that moral principle, but would argue, however, that it is simply unrealistic or counterproductive in the Cambodian context: that Cambodians do not want accountability, or that accountability will tear apart Cambodian society.

100. Concerning public opinion, the Group did hear a strong desire among Cambodians in and out of Government for peace. But none suggested that peace and trials were irreconcilable, or that Cambodians saw peace as a substitute for justice. Moreover, in our view, the fabric of Cambodian society can never be sown together and peace and stability solidified until there is a fair accounting of the past immune (or as immune as possible) from the politics of the present. We believe that Cambodian society will only be able to understand and move beyond its past when it sees those who undertook massive atrocities brought before impartial justice, a justice that is not trying to impose its own view of history on the Cambodian people. Trials also serve to establish for the Cambodian community what is unacceptable conduct and what should be its inevitable consequences. We are not so naive as to believe that trials will miraculously change the human rights picture in Cambodia overnight, but they are an important step in that process.

101. As for arguments regarding the counterproductiveness of such trials, and in particular that such trials would be destabilizing for Cambodia, the analysis that follows takes this position carefully into consideration. Our recommendations are constructed so as to take into account the need for both individual accountability and national reconciliation. Nevertheless, we do not believe that trials would, per se, be destabilizing and not worth the effort. Rather, we believe, based on our consultations in Cambodia, that, after 20 years of waiting, Cambodians are ready for trials and would embrace them.

VII. FEASIBILITY OF BRINGING KHMER ROUGE LEADERS TO JUSTICE

A. Targets of investigation

102. The critical preliminary issue in assessing the feasibility of bringing leaders to justice and making recommendations regarding options for doing so is the number of persons who should be brought before a court of appropriate jurisdiction. As noted in the historical discussion above, the atrocities that took place in Democratic Kampuchea were committed by thousands of individuals, with varying levels of responsibility across the country. Most are still living in Cambodia, often within sight of their victims, while some have been killed or have fled the country. The Group of Experts devoted considerable attention to how many should be brought for trial; it was discussed extensively in our consultations with governmental and non-governmental representatives.

103. One obviously important determinant is the opinion of the Cambodian people. Of the persons with whom the Group met, the great majority suggested that only "leaders" of the Khmer Rouge form the targets of investigation, and not low-level cadre, even though those cadre were the persons who actually committed various atrocities. It was suggested that trials of large numbers of defendants would be impossible as a practical matter and potentially damaging to national reconciliation. Only a small minority suggested that all persons who committed atrocities should be tried, regardless of the costs or consequences.

104. Among the many Cambodians who expressed a desire that only "leaders" of the Khmer Rouge face criminal proceedings, there was a wide disparity in the meaning of this term. Some governmental officials suggested that trials be limited to the handful of former senior Khmer Rouge officials who, at the time of our visit, had refused to surrender to the Government. Others suggested a more extensive group of senior leaders most responsible for the atrocities of the period. The Group was also presented with the view, principally of non-Cambodians, that trials of those Khmer Rouge leaders from the 1970s who have agreed to halt their struggle against the Government in exchange for overt or private assurances of non-prosecution would be destabilizing for Cambodia and even risk returning the country to the state of civil war that dominated the 1980s.

105. The Group notes that its mandate calls for recommendations regarding bringing "Khmer Rouge leaders" to justice. Our sense of this term is guided by General Assembly resolution 52/135, which calls for our group to "propose further measures as a means of bringing about national reconciliation, strengthening democracy and addressing the issue of individual accountability", without limiting the issue to that of "leaders", and by the letter of the Cambodian Government of 21 June 1997, which refers simply to "those persons responsible" for the crimes of Democratic Kampuchea.

106. In light of the above, the Group has reached five conclusions regarding the targets of investigation. First, we do not believe that prosecutions should attempt to bring to justice all or even most people who committed violations of international or Cambodian law during the relevant period. Such a scenario is, first and foremost, logistically and financially impossible for any sort of tribunal that respects the due process rights of defendants. Moreover, it is our sense that, whatever one's views about a need for clarity about the events of the past, a reopening of the events through criminal trials on a massive scale would impede the national reconciliation so important for Cambodia and highlighted in resolution 52/135. Finally, the legal questions surrounding the responsibility of many persons at low levels, particularly youthful offenders, are complex and suggest that these persons should not be tried.

107. Second, the Group has carefully considered the concerns noted above regarding the possible effects of prosecuting persons who have surrendered to the Government or returned to civilian life, but does not believe, based on our assessment, that they warrant precluding such prosecutions. As an initial matter, we note that such a limitation is arbitrary in two senses: it ignores the principle that criminal culpability should be linked with the degree of personal responsibility of an individual and not partisan political factors - that justice is blind; and it imparts to the notion of "leaders" a

meaning that is at odds with the common understanding of the term. Moreover, the logical consequence of such an argument is that, because nearly all Khmer Rouge leaders have agreed to surrender, no prosecutions should take place. This contradicts the views that we heard while in Cambodia as well as elementary notions of accountability for serious crimes.

108. More significant, however, as a factual matter, many of the possible suspects do not now have armed forces at their disposal. As for the possibility that others who have surrendered might remobilize their forces to mount a renewed struggle against the Government, it is our sense that their followers in general do not exhibit the type of loyalty and military discipline necessary for such an outcome, but are rather interested in simply securing a decent life for themselves and their family. Most important, because the targets of investigation will be limited to those in leadership positions from 1975 to 1979 who were responsible for atrocities, and not Khmer Rouge officials who became leaders of the guerrilla army after 1979 and who did not commit atrocities during the period from 1975 to 1979, the risk of troop redefection becomes smaller. A tribunal that is seen to scrupulously protect the defendants' legal rights would also guard against this risk. We therefore significantly discount these fears of renewed warfare.

109. Third, the Group does not believe that the term "leaders" should be equated with all persons at the senior levels of Government of Democratic Kampuchea or even of the Communist Party of Kampuchea. The list of top governmental and party officials may not correspond with the list of persons most responsible for serious violations of human rights in that certain top governmental leaders may have been removed from knowledge and decision-making; and others not in the chart of senior leaders may have played a significant role in the atrocities. This seems especially true with respect to certain leaders at the zonal level, as well as officials of torture and interrogation centres such as Tuol Sleng.

110. Therefore, fourth, the Group recommends that any tribunal focus upon those persons most responsible for the most serious violations of human rights during the reign of Democratic Kampuchea. This would include senior leaders with responsibility over the abuses as well as those at lower levels who are directly implicated in the most serious atrocities. We do not wish to offer a numerical limit on the number of such persons who could be targets of investigation. It is, nonetheless, the sense of the Group from its consultations and research that the number of persons to be tried might well be in the range of some 20 to 30. While the decisions on whom and when to indict would be solely within the discretion of a prosecutor, the Group believes that the strategy undertaken by the prosecutor of any tribunal should fully take into account the twin goals of individual accountability and national reconciliation.

111. Fifth, and finally, the Group believes that the above sense of the scope of investigations should be no more than a guide for prosecutors and not form an element of the jurisdiction of any tribunal. Thus, any legal instrument related to a court should give it personal jurisdiction over any persons whose acts fall within its subject matter jurisdiction, and the decision on whom to indict should rest solely with the prosecutor, bearing the above guidance in mind. A fortiori, the Group opposes the creation of a tribunal that would explicitly be limited in advance to the prosecution of named individuals.

B. Location of suspects

112. The majority of persons who would form the targets of investigation are currently in Cambodia. Many have quietly reintegrated themselves into Cambodian life. Almost all would seem to be in areas formally under the administration of the Cambodian Government, some residing in areas close to the Thai border under the effective control of former Khmer Rouge. The location of one senior leader (Ta Mok) is, as of the time of this report, subject to some dispute. It would appear to the Group from credible reports that he is in an area of the Thai-Cambodian border where, at any given time, he might be on either side of the border. Possible targets of investigation may also be living in other States, including those with large numbers of expatriate Cambodians, such as Australia, France or the United States.

C. Feasibility of apprehending and detaining suspects

113. The Group raised the issue of apprehension and detention of suspects in most of its meetings. The feasibility of these courses of action turns on two basic issues: the ability of the Governments concerned to undertake them and their willingness to do so. Both of these factors are not, of course, static or independent variables, but can change depending upon political conditions, the involvement of outside assistance and other factors. Our assessment is based on the situation as we determined it during our missions.

114. Regardless of the type of court before which defendants would appear, the primary onus for apprehending and detaining suspects is upon the State in whose territory they are. This means that, for the vast majority of defendants, their capture would be the primary responsibility of the Cambodian Government. As to the ability of the Government to apprehend and detain suspects, the Group notes that the location of most suspects is known, and they are not physically protected from arrest. Indeed, three leaders of the Democratic Kampuchea regime were received by the Government in Phnom Penh in December 1998. At the same time, we note the inability of the Cambodian police to identify and arrest many people responsible for more recent crimes and abuses. In addition, for some individuals, the cooperation of Thailand may be necessary for their arrest.

115. As for the willingness of Cambodia to apprehend and detain suspects, the Group notes that, despite the passage of 20 years since the ouster of the Khmer Rouge, no Khmer Rouge official has ever been arrested and brought before a Cambodian court to answer for atrocities committed during the years of Democratic Kampuchea. During our meeting with the then-Second Prime Minister and now-Prime Minister Hun Sen, however, he informed the Group that the Government would apprehend any person indicted by the independent prosecutor of a tribunal trying Khmer Rouge officials. According to him, this process might involve several steps that would allow for the voluntary surrender of the individual, but, if such steps failed, the Government would arrest the person. The Group welcomes this official and top-level commitment of support for trials of Khmer Rouge leaders, which support will be essential for the success of such trials.

116. Regarding the apprehension and detention of persons who might be in other States, the possibility that Khmer Rouge suspects may now or in the future be on the Thai side of the Cambodian border raises the question of the ability and willingness of the Thai Government to arrest such persons. Based on our meetings with Thai officials and others, the Group is confident that the Thai Government is able to arrest persons on the Thai side of the border. As for the willingness of the Thai Government to do so, the Group was informed by the Deputy Foreign Minister of Thailand, Sukhumbhand Paribatra, that it was not the Government's policy to accept such persons and that if the Government of Cambodia requested the trial of such persons and they were clearly located on Thai soil, the Government would undertake necessary actions in accordance with Thai law to turn them over to the appropriate court. (See discussion in section VII.D below regarding extradition and surrender.) The Group was also informed that, in the event that the Government of Cambodia attempted to arrest such persons, the Government of Thailand would prevent their seeking refuge in Thailand. The Group likewise welcomes these statements.

117. The Group of Experts did not investigate in any detail the feasibility of apprehending and detaining suspects located in other countries. However, it is the view of the Group that the countries most likely to have such persons on their soil would be able to arrest them, and it assumes that most such countries would be willing to do so if a competent court were to ask for such cooperation.

118. The Group further wishes to underline its awareness that the success of any prosecutions will depend upon the willingness of States, and in particular Cambodia, to arrest suspects unwilling to surrender. The presence of some defendants and the absence of others from the International Tribunal for the Former Yugoslavia is clear evidence of this. In the case of Cambodia, it seems extremely unlikely that an international force will undertake the task of apprehending suspects. Thus, the onus will fall on States, acting separately or together, to undertake this process.

D. Feasibility of the extradition or surrender of suspects

119. The extradition or surrender of suspected persons is relevant for consideration if the suspects are located in a State that is not itself responsible for trying them. It thus becomes important if Cambodia is to try persons who are located outside the country or if an international court is to try persons. In this context, the signatories to the 1991 Paris Accords assumed obligations to "promote and encourage respect for and observance of human rights and fundamental freedoms in Cambodia as embodied in the relevant international instruments in order, in particular, to prevent the recurrence of human rights abuses".[61] This undoubtedly implies a duty to support efforts to bring Khmer Rouge offenders to justice.

120. In the case of trials before a Cambodian court, the Group is aware of no extradition treaties between Cambodia and any other State currently in force. Cambodia and Thailand concluded such a treaty in 1998, but it has not yet been ratified.[62] If the treaty were to enter into force, Thailand would implement it through domestic legislation, including its 1929 extradition statute, which provides for various procedural steps. In the absence of extradition treaties,

some States, including Thailand, could deport persons for trial before Cambodian courts under various immigration and deportation statutes that often provide for more expedited transfer of persons.[63] If suspects were to be tried before an international court, bilateral extradition treaties are inapplicable, but these persons could be transferred under deportation provisions in immigration laws or through statutes enacted especially to provide a legal basis for such cooperation.[64]

121. With respect to the willingness of States to extradite or surrender suspects, the Group recalls the points made in section VII.C above, and, in particular, the official position of the Government of Thailand as conveyed to the Group by the Deputy Foreign Minister. The Group believes that most other States that might have such suspects on their soil would also be willing to extradite or surrender them to a court of appropriate jurisdiction.

VIII. OPTIONS FOR BRINGING PERSONS TO JUSTICE

A. A Tribunal established under Cambodian law

122. The first option considered by the Group is the conduct of criminal trials under Cambodian law in a domestic court, under the sponsorship of the Cambodian Government. As a party to the Genocide Convention, Cambodia is obligated to punish genocide that took place on its territory; in the 1991 Paris Accords, it undertook "to take effective measures to ensure that the policies and practices of the past shall never be allowed to return", to "ensure respect for and observance of human rights and fundamental freedoms in Cambodia", and "to adhere to relevant international human rights instruments".[65]

1. Legal framework for domestic trials

123. Cambodia already has a judicial system, although its legal foundations are somewhat imprecise and its functioning deficient in most important areas. The 1993 Constitution provides for an independent judiciary through a Supreme Court and lower courts.[66] The King appoints judges upon the recommendation of the Supreme Council of Magistracy, which was established by the National Assembly in 1994,[67] but has met only twice since then, in 1997 and 1998. Although the post-1993 Government has not enacted any detailed laws on the organization of the judicial system, the judicial system currently has trial courts, an appellate court and a Supreme Court. As a matter of the structure of the judiciary, trials in Cambodia could thus take place in the ordinary courts as currently constituted or through the creation by legislation of a special tribunal under Cambodian law.

124. Regarding the substantive law to be applied by such a court, the principle of nullum crimen sine lege requires that the crimes at issue be judged solely from the perspective of the law in force in 1975, i.e., the Code Pénal of 1956 (see section V.B above). No principle of either international law or domestic law would bar the application of the 1956 code to trials, regardless of the criminal law in force in Cambodia at the time of trials. To make the application of such law explicit, the National Assembly could, perhaps with

assistance in its preparation by foreign experts, pass a special statute recognizing the applicability of such law to crimes committed during the period from 1975 to 1979. Provisions incompatible with the Constitution, notably the death penalty for certain crimes, would not remain in force.[68] Nevertheless, the lack of familiarity of Cambodian judges with that old code could render its use in trials quite difficult. The special statute could also make provision for charging defendants with international crimes that were recognized as of 1975, even if such crimes were not included in the Code Pénal.

125. Cambodian criminal procedure is currently in a state of flux. It is governed in theory by the 1993 Constitution and several prior and subsequent laws. First, the Constitution provides that the arrest, indictment or detention of any person must be done in accordance with law, and bans coercion or physical mistreatment as well as confessions obtained through force. It also includes the right to counsel and the presumption of innocence, adding that "[a]ny case of doubt shall be resolved in favour of the accused".[69] Second, the 1992 Supreme National Council Decree on Criminal Law and Procedure, drafted by United Nations officials during the United Nations Transitional Authority in Cambodia period, provides a 75-article basic framework of criminal justice. This law remains in force by virtue of article 139 of the 1993 Constitution.[70] According to the law, judges "must decide in complete impartiality, on the basis of facts which are presented to them, and in accordance with law, refusing any pressure, threat or intimidation, direct or indirect, from any of the parties to a proceeding or any other person".[71] It contains a simplified system of criminal procedure with basic rights for the accused.[72] Third, the National Assembly of the State of Cambodia adopted a Law on Criminal Procedure on 28 January 1993, which the Council of State promulgated on 8 March 1993. This law, which also remains in force by virtue of article 139 of the 1993 Constitution, provides for both public and private (i.e., victim-initiated) prosecutions.[73] Courts in Cambodia have relied upon this law for their proceedings, ignoring the greater protections afforded defendants in the 1992 law. Beyond the supremacy of the Constitution - at least as a matter of principle - the relationship between the various laws of criminal procedure remains vague.

2. Functioning of the Cambodian judiciary

126. In order to evaluate the option of trials in Cambodian courts, the Group has devoted considerable attention to the state of the Cambodian judiciary. It has consulted officials of the Cambodian Government responsible for the administration of justice (including the Chief Justice of the Supreme Court), international and non-governmental organizations and the reports of the Special Representative of the Secretary-General for Human Rights in Cambodia. It is the opinion of the Group that the Cambodian judiciary presently lacks three key criteria for a fair and effective judiciary: a trained cadre of judges, lawyers, and investigators; adequate infrastructure; and a culture of respect for due process.

127. First, one of the many legacies of Cambodia's decades of civil conflict is the lack of a qualified legal profession in Cambodia. Most attorneys and scholars fled during the 1960s and 1970s or were killed by the Khmer Rouge; those who entered the profession during the years of the People's Republic of

Kampuchea or the State of Cambodia received their training under a system in which courts were not independent. Lack of experience with evidentiary issues has often led courts to use shoddy police reports as the sole basis for convictions. The number of qualified judges is thus very small, though perhaps large enough to form a bench for trials of the Khmer Rouge. However, the enormity of the Khmer Rouge's atrocities and the effect they appear to have had on every household means that it would be difficult to find a judge free of the appearance of bias or prejudice.

128. Second, the infrastructure of the Cambodian legal system is poor even for the developing world. Courts lack law books, typewriters and other basic necessities, especially in the provinces. The buildings are run-down. Jails are marked by deplorable conditions.

129. Third and most troubling for the option of domestic trials, Cambodia still lacks a culture of respect for an impartial criminal justice system. Criminal justice receives only a fraction of a per cent of the national budget, with judges paid as little as $20 per month. As a result, despite the presence of persons of character in parts of the judiciary, it is widely believed that judges can easily be bought by defendants or victims. The vast majority of judges are also closely associated with the Cambodian People's Party. Powerful elements in the Government such as important political figures, the security apparatus and the Ministry of Justice are widely believed to exert overt and covert influence over the decisions of investigating judges and trial courts. These include threats and physical attacks on judges; or simply the realization among judges that their tenure, and often their prospect of future livelihood, depend upon the approval of political elements. Moreover, criminal defence attorneys, even if trained properly, are stymied in their work. Judges are said to pay little attention to their legal arguments, even in routine cases. The courts and police restrict their contact with clients, even during court sessions. Defenders can also face threats from victims' families or friends. Treatment of those jailed pending trial or those in prison remains far below international standards. In sum, Cambodia's system falls far short of international standards of criminal justice established in the International Covenant on Civil and Political Rights and other instruments.[74]

130. A related issue concerns security for trials held in Cambodia. Trials of members of the security forces have been disrupted or prevented by governmental units with impunity. Trials of the Khmer Rouge are likely to be well attended, necessitating careful and professional management of crowds. It is possible that the trials may ignite old passions among observers. Defendants, prosecutors, judges and witnesses may become targets of attack and will need ample protection, in the case of witnesses possibly including prolonged post-trial protection. Escapes from prison are common. It is not thus at all evident that the Cambodian police are properly trained to address these types of situations.

3. Recommendations

131. In order to conduct domestic trials that meet international standards of due process, Cambodia, alone or with foreign support, would have to undertake a

number of critical steps, including (a) clarification of the law and procedure to apply to such trials, e.g., through special legislation; (b) providing trained lawyers and investigators to undertake prosecutions; (c) providing a functioning set of facilities, including a courtroom, prison and investigative and prosecutorial offices; and (d) ensuring a fair and impartial set of judges, free from political control or pressure.

132. The Group of Experts is keenly aware of the advantages of organizing a trial under Cambodian law. Most obviously, it places the responsibility on the State most directly affected and avoids the political, financial and administrative complications inherent in setting up an international tribunal. For the following reasons, however, the Group is of the opinion that domestic trials organized under Cambodian law are not feasible and should not be supported financially by the United Nations.

133. First, in the light of what we heard during our mission to Cambodia, even from some high official sources, the level of corruption in the court system and the routine subjection of judicial decisions to political influence would make it nearly impossible for prosecutors, investigators and judges to be immune from such pressure in the course of what would undoubtedly be very politically charged trials. The decisions on whom to investigate and indict, and to convict or acquit, must be based on the evidence and not serve to advance the political agenda of one or another political group. This is necessary in order to respect the integrity of the proceedings and to accord fundamental fairness to defendants.

134. Second, trials of the Khmer Rouge leaders must observe the maxim that justice not only be done, but be seen to be done. To serve the purposes of criminal justice outlined in the introduction to our report, the Cambodian people must have confidence in the fairness of the process. Otherwise, they will regard this as a partisan political exercise. Moreover, the possibility of any of the lessons to be gained from fair and impartial trials being absorbed by the Cambodian public is diminished if the population does not believe in the process. In the course of its work, the Group has reached the opinion that the Cambodian public does not, at the present time, have such confidence in its judiciary. This view was presented to us by governmental representatives, representatives of non-governmental organizations, officials of international organizations and independent observers of Cambodia, and the Group has no reason to doubt it. It strongly suggests that no Cambodian proceeding would be accepted by the people. The Group notes that in their letter of 21 June 1997 to the Secretary-General, and speaking of the conduct of criminal trials of Khmer Rouge leaders, Cambodia's two Prime Ministers stated that "Cambodia does not have the resources or expertise to conduct this very important procedure".

135. The obvious response to these concerns is to ask whether it is possible to construct a process based on Cambodian law that would overcome the inadequacies of the system and the resultant public mistrust of it. The Group has carefully considered a number of methods for this purpose. They generally fall into two categories: financial support from international organizations and foreign Governments; and involvement of personnel from those organizations and Governments.

136. As to financial support, the Group believes that such support could overcome some of the obstacles noted above, e.g., by providing for the construction of acceptable physical facilities for trials; by paying judges, prosecutors and investigators enough to make bribery less likely; by offering competent defence attorneys to the accused; and by allowing for the sophisticated investigative techniques so important when the evidence is as old as it is in this case. Nevertheless, money alone cannot overcome the key impediment above, namely the susceptibility of all persons involved in the process to political pressure.

137. The involvement of trained personnel from international organizations and Governments would improve the process of Cambodian trials. For example, such personnel could serve with Cambodians as prosecutors, investigators and defence attorneys. It is even possible to consider a mixed Cambodian-foreign court, with equal number of Cambodian and non-Cambodian judges, or a completely non-Cambodian court established under Cambodian law and applying Cambodian law, international law, or both. The Group carefully considered the option of such a mixed or foreign court established by Cambodia. It nevertheless declines to recommend this option because of concerns, based on our assessment of the situation in Cambodia, that even such a process would be subject to manipulation by political forces in Cambodia. The possibilities for undue influence are manifold, including in the content of the organic statute of the court and its subsequent implementation, and the role of Cambodians in positions on the bench and on prosecutorial, defence and investigative staffs. A Cambodian court and prosecutorial system, even with significant international personnel, would still need the Government's permission to undertake most of its tasks and could lose independence at critical junctures.

138. Our decision to recommend against United Nations involvement in the establishment of a Cambodian tribunal is not an easy one and comes only after careful consideration of the situation in Cambodia based on our research and interviews. It doubtless will be difficult for some to accept our opinion that even substantial international funding and insertion of international personnel will not be worth the effort in that it will still encounter the many impediments likely to be placed in its way as a result of Cambodian politics. But we believe it is our responsibility to reject options that are not likely to be feasible and not to encourage the United Nations to fund any tribunal that is unlikely to meet the minimal standards of justice.

B. A Tribunal established by the United Nations

139. The second option the Group considered is the establishment of an ad hoc international tribunal by the United Nations. After careful evaluation of all the alternatives and as explained in detail in section 7 below, it is this option that the Group strongly recommends.

1. Methods of establishment

140. The only United Nations organ to date that has established an ad hoc international criminal tribunal is the Security Council, which established the

International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. Both tribunals were established under Chapter VII of the Charter of the United Nations as a means of responding to threats to the peace in those regions.

141. In the case of Cambodia, the Group believes that the Security Council could, as a legal matter, create a new tribunal for Cambodia under various parts of the Charter. First, the Council could follow the model of the prior tribunals and create the tribunal under Chapter VII. The Group believes that arguments can be made that the continued impunity of the Khmer Rouge in the face of popular demands for justice constitutes a threat to the peace of the region and that criminal accountability would help address this matter. Indeed, statements about the danger of human rights atrocities to international peace have been heard at the United Nations both recently and many years ago.[75]

142. The Group is aware of concerns that such a decision of the Council would be unprecedented in that armed conflict has presently ceased in Cambodia as a result of events of recent months, the refugee problem is generally resolved and there are no serious tensions between Cambodia and its neighbours due to the Khmer Rouge issue. If, then, the Security Council were not willing to invoke Chapter VII, the Group believes that it could create a tribunal under Chapter VI, which gives it broad powers over issues related to international peace and security. This chapter (especially Article 36) has served as a basis for consent-based peacekeeping and has formed a basis for other consent-based activities by the Council. Beyond Chapter VI, it is possible for the Council to act under other parts of the Charter, such as Article 29, which allows it to "establish such subsidiary organs as it deems necessary for the performance of its functions".

143. The difference between a tribunal created under Chapter VII and one created under another part of the Charter may or may not be significant in principle or practice. The key issue seems to be the legally binding nature of the resolution creating such a tribunal - especially provisions requesting cooperation with it. Chapter VII decisions are always legally binding on all States. However, as held by the International Court of Justice in the Namibia Case, the Security Council may make binding decisions under various parts of the Charter and not merely Chapter VII.[76] That is, the obligation of States to comply with the decisions of the Council under Article 25 of the Charter extends to all decisions of the Council, not merely those under Chapter VII.

144. If the Council acted explicitly under Chapter VI, it should be noted that that Chapter's relevant articles speak only of recommendations of the Council. Thus, if the Council created a tribunal under Chapter VI, the Court would, as a legal matter, have to rely upon the willingness of States to carry out those recommendations. The court might well lack the power to issue binding orders to other States,[77] and some States might find it easier to justify to their own constituencies compliance with requests from the court if the court were created under Chapter VII. The question of jurisdiction over the defendants would probably also entail different considerations from those accepted by the International Tribunal for the Former Yugoslavia in the 1995 Tadic jurisdiction decision.[78]

145. Nevertheless, the difference between Chapter VI and Chapter VII may turn out to be rather small in practice. The experiences of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda suggest that voluntary cooperation of States is essential in either case; and not even a Chapter VII mandate has ensured compliance with the orders of the existing tribunals. Moreover, even if a court were created under Chapter VI, the Council could nonetheless decide to make individual decisions under Chapter VII on specific issues where the consent of the States concerned was not forthcoming, and enforce them accordingly. The Council has used this strategy of moving from Chapter VI to Chapter VII in the past.[79] And, as noted, it is possible for the Council to make binding decisions under other parts of the Charter.

146. A third possibility entails creation of a tribunal by the General Assembly under its recommendatory powers under Chapter IV of the Charter, especially Articles 11 (2) and 13. The Assembly has, in the past, created subsidiary bodies with various powers, such as the first United Nations Emergency Force, the United Nations Council on Namibia and the 1990 Haiti election verification mission.[80] As with a Chapter VI court, an Assembly-created court would also rely exclusively on the voluntary compliance of States.

147. Finally, the Group would not wish to preclude the creation of a tribunal by other organs of the United Nations, including the Economic and Social Council or the Secretary-General.

148. It is the preference of the Group that an international tribunal be established by the Security Council under Chapter VII, Chapter VI or some other part of the Charter. We favour the use of the Council because of the speed with which it can act given its small membership and the experience of a significant number of its members with the creation and operation of ad hoc tribunals. If no tribunal is established by the Council, the Group believes that it should be established by the General Assembly. This would require delegation of the preparation of the statute to a relatively small group of States that could prepare it expeditiously.

2. Jurisdiction

149. The temporal jurisdiction of a United Nations tribunal would be a matter for the organ creating it. The Group is of the strong opinion that, as with its own mandate, the temporal jurisdiction of such a tribunal should be limited to the period of the rule of Democratic Kampuchea, i.e., 17 April 1975 to 7 January 1979. As discussed earlier regarding the Group's mandate, consideration of human rights abuses by any parties before or after that period would detract from the unique and extraordinary nature of the crimes committed by the leaders of Democratic Kampuchea.

150. Regarding subject matter jurisdiction, as noted in section V above, the abuses of the period of Democratic Kampuchea are such as to suggest that a court could have jurisdiction over crimes against humanity, genocide, war crimes and other acts incurring individual criminal responsibility under international law; as well as violations of Cambodian law. The Group believes that a United

Nations tribunal must have jurisdiction over crimes against humanity and genocide. These two crimes, especially crimes against humanity, constituted the bulk of the Khmer Rouge terror.

151. As for war crimes, while the historical record clearly suggests their commission, the Group notes that, in establishing the International Tribunal for the Former Yugoslavia, the United Nations has set the important precedent that war crimes prosecutions should not be limited to one side in a conflict. This principle would mean that, if war crimes were included in the jurisdiction of a court for Cambodia, it would have to include war crimes by persons from other States during the period of Democratic Kampuchea. For the reasons discussed above, we believe this would divert the attention of the court from the bulk of the atrocities, and we thus believe war crimes should not be included.

152. Regarding the other international crimes noted above - forced labour, torture, and crimes against international protected persons - the Group notes that these were not included as separate crimes in the jurisdiction of the existing tribunals. Although the Group believes that crimes against humanity and genocide would likely suffice for the tribunal's jurisdiction, we nonetheless would suggest that consideration be given to the inclusion of the separate crimes of forced labour and torture, as prosecution on those charges would not necessitate proof of the special elements of crimes against humanity or genocide.

153. The Group has also considered whether an international tribunal should prosecute offences under Cambodian law. Such an option is legally possible, and, as noted above, it would seem easier to prove violations of Cambodian law than of international law owing to the absence of the special elements of crimes against humanity and genocide. Prosecution of such crimes might not, however, be a wise investment of time of the prosecuting staff and judges in light of the difficulty in finding sources that elaborate that law. While they might have recourse to related systems of law, notably French law, it would clearly involve additional time beyond that needed for prosecution of international crimes. Nevertheless, if those preparing the tribunal's statute wished to create additional legal bases for conviction, then inclusion of Cambodian offences in the tribunal's jurisdiction is worthy of consideration.

154. Finally, as for personal jurisdiction, the issue of the appropriate targets of investigation is discussed at length in section VII above. Although the Group believes that the Prosecutor should confine his or her inquiry to the types of persons described there - those persons most responsible for the most serious violations of human rights during the reign of Democratic Kampuchea - the statute of the tribunal should use unqualified language along the lines of the Tribunals for the Former Yugoslavia and Rwanda, e.g., "persons responsible for serious violations of human rights committed in Cambodia". It is worth reiterating that only individuals would fall within the jurisdiction of the tribunal.

3. Structure

155. The existing tribunals operate with two or three trial chambers of three judges and an appeals chamber of five judges. The Group believes that a similar arrangement would be needed for a Cambodia tribunal, i.e., at least two trial chambers of three judges and an appeals chamber of five judges. This will require the appointment of new judges to serve on the trial chambers. Having regard to the existing workload of the appellate judges of the International Tribunal for the Former Yugoslavia, who form the appellate chambers of both existing tribunals, we also favour a new panel of appellate judges. It could be constituted ad hoc from the judges of the trial chambers of the new tribunal or could be a separate body convened as occasion requires.

156. Regarding the national make-up of the court, the Group has carefully weighed the advantages and disadvantages of including one or more Cambodian jurists on the court and discussed this issue with our interlocutors in Phnom Penh. Inclusion of such judges would help ground the proceedings in the Cambodian experience and increase the possibility that the proceedings would be seen by Cambodians as linked to them.

157. The Group is nonetheless concerned about three factors, in increasing order of importance, each of which was also relevant to our consideration of the option of trials in the Cambodian courts. First, given the ravages experienced by the Cambodian legal system over the last generation, it might be difficult for the United Nations to locate a sufficiently trained jurist who would have the expertise necessary to participate on such a panel. Senior legal officials in the Cambodian Government confirmed that any Cambodian judge would need training in international criminal law and procedure before serving on a panel.

158. Second, even if such a person were located, the Group is concerned that he or she would face political pressure to rule a certain way. The judge's professional future in Cambodia - indeed, even his or her personal safety and that of his or her family - might well depend on the way he or she adjudicates. Nonetheless, it is possible that such political pressures could somehow be overcome - perhaps through the appointment of a Cambodian of unusually independent stature or even an expatriate Cambodian - or simply by virtue of the Cambodian judge's close work with his or her international colleagues.

159. Third, the Group is most concerned that, owing to the scale of the Khmer Rouge's atrocities, it might well be impossible to find a judge free of at least the appearance of prejudice. It is our sense that, if not himself or herself a victim of the Khmer Rouge, each candidate would have friends or relatives who had been its victims. It was this same issue that ultimately led the United Nations to exclude nationals of the States of the former Yugoslavia and of Rwanda from those tribunals.

160. In light of the above, the Group believes that a United Nations tribunal should ideally include at least one Cambodian judge, but may well have to include only non-Cambodians. We recognize the disadvantages of a wholly foreign court. However, because the fairness of the process would be the hallmark of a United Nations tribunal and the chief factor distinguishing it from a Cambodian tribunal, the Group believes this may well be necessary. At the same time, we

would recommend that the United Nations actively seek a qualified, impartial and appropriate Cambodian.

161. As for the Prosecutor and his or her staff, after careful reflection we believe that the Prosecutor of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda should serve as the Prosecutor of the new tribunal. Although we believe that the issue of the Khmer Rouge is important enough to justify its own prosecutor, in the end we endorse the model of a shared prosecutor as currently used in those tribunals. The stature and experience garnered by the Prosecutor of the existing tribunals can be best applied to the new prosecutions if the same person oversees and is responsible for the organization of the Cambodia prosecutorial staff. While the heavy workload of the current prosecutorial staff of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda would not permit simply adding a new set of prosecutions to their responsibilities, sharing of expertise is more likely if the new staff reports to the same person. We further believe that consistency of prosecutorial policy in terms of approaches to outside actors (States, international organizations and non-governmental organizations) for cooperation, responses to defendants' requests and other matters is essential.

162. We recognize and accept the risk that a common prosecutor might make or refrain from making certain arguments in front of the United Nations Cambodia tribunal in order not to undercut a position taken in front of the International Tribunal for the Former Yugoslavia or the International Criminal Tribunal for Rwanda. This must always be guarded against; the Cambodia prosecutions must receive the significance they deserve. Finally, we believe it is absolutely essential that the Prosecutor have a highly qualified deputy specifically assigned to the Cambodia prosecutions with significant authority over day-to-day decisions.

163. It is worth noting that our recommendation precludes the choice of a Cambodian Prosecutor or deputy, a decision that is absolutely essential in order to insulate them from the political pressures noted above and provide them with the independence to indict and try persons as they see fit in the best interests of justice and national reconciliation. As for Cambodians on the staff of the Prosecutor, we believe inclusion of such staff would be desirable provided they in no way compromised the independence of the Prosecutor. That would require ensuring, for instance, that the Prosecutor's staff respect the confidences of the office regarding targets of investigation and strategies for prosecution. The excellent work of Cambodian staff in the Cambodia Office of the United Nations High Commissioner for Human Rights, several human rights organizations and the Documentation Centre suggests they could make an important contribution to the prosecution. Nevertheless, the risk of Cambodians on the staff being subject to pressure of all kinds would be real.

4. Location

164. The location of an international tribunal is among the most important issues for the United Nations and was a major consideration of the Group of

Experts. The Group considered three options: trials in Cambodia, trials in The Hague or trials elsewhere.

165. Trials in Cambodia would, in principle, offer distinct advantages to the process. Cambodians would witness the proceedings in person, local media coverage would be intense and the facts of the Khmer Rouge years would be brought to the forefront of public attention through an impartial proceeding. A trial in Cambodia would thus prove very important to a key goal of accountability - promotion of national reconciliation through an understanding of the past and inculpation of those responsible for atrocities. In terms of furthering this purpose, Cambodia would clearly be the ideal location.

166. Other factors brought to the Group's attention during its mission to Cambodia, however, militate against trials in Cambodia. First, the Group is concerned that, in the case of Cambodia, to have a trial at the heart of the country where the atrocities occurred would jeopardize the security of the proceedings. The Group fears that the facilities might well face threats from various groups favourable to one side or another. It is possible, of course, that these problems could be addressed through a significant United Nations security presence, e.g., a heavily guarded compound for the tribunal.

167. Second, and of greater importance, the Group fears that the location of the tribunal in Cambodia would subject it to pressures of one kind or another from various domestic political forces. As stated in section VI above, the issues raised by a trial of the Khmer Rouge are very much alive today. Different political forces have interests capable of being affected by the conduct and outcome of any trials. This could manifest itself in attempts to meet with and influence judges or prosecutors, the denying of various forms of cooperation necessary for the proper functioning of a tribunal in Cambodia, or even worse. The Group realizes that the Government's cooperation is a sine qua non for any successful prosecution, but we believe it is imperative that the trial process be kept immune from political interference.

168. In light of the above, the Group has reluctantly concluded that trials in Cambodia are fraught with too many dangers and that a United Nations tribunal should be located elsewhere. It is worth noting that this was also the view independently expressed to the Group by a number of Cambodians.

169. A second location brought to the Group's attention by a number of our interlocutors is The Hague, seat of the International Tribunal for the Former Yugoslavia, as well as the International Court of Justice and the future International Criminal Court. Those who advocated this option to us believed that location of the United Nations court in The Hague would provide it with a greater degree of legitimacy in the eyes of the Cambodian people and demonstrate that the issue was being taken seriously by the international community. Others felt that co-location with the International Tribunal for the Former Yugoslavia would save the United Nations money and time as facilities and some personnel could be shared. Still others pointed out that, if Cambodia were not to be an option, it did not matter where the tribunal was located, so The Hague seemed a logical place.

170. The Group considered these views carefully but ultimately cannot recommend The Hague as the optimal location either. First, we are concerned that The Hague is simply too far from the location of the atrocities for trials to have an impact on the population and its leadership. In this sense, we endorse the logic of the Security Council in basing International Criminal Tribunal for Rwanda in east Africa. The Hague's location in a very different time zone from Cambodia also means a degree of complexity in television and radio access for Cambodians to court proceedings at convenient hours. Second, we are not convinced that co-location with the existing tribunals will save much money. Though perhaps one or another of the existing courtrooms might be used at times, it would seem that the Cambodia tribunal would need its own set of facilities, including new courtrooms. The headquarters of the International Tribunal for the Former Yugoslavia is now nearly fully occupied with the staff of that court. And, as noted above, a new tribunal will need its own judges and teams of prosecutors and investigators, who cannot simply be borrowed from the Yugoslavia tribunal.

171. The Group's ultimate conclusion, after its review of the above options, is that the best location for the United Nations tribunal would be a city in a State situated somewhere in the Asia-Pacific region. A tribunal in such a city would preserve for Cambodians the sense that trials were taking place in their own part of the world and not, for instance, in distant Europe, and would enable Cambodians to follow them closely. At the same time, its location would be insulated from the political pressures of Cambodia.

172. There appear to us to be a number of criteria that such a city should satisfy: relative proximity to and ease of access to Cambodia, permitting speedy travel by prosecutorial staff and investigators and by attorneys and witnesses; location in a time zone close enough to Cambodia to readily allow the Cambodian community to follow trials directly through local electronic media; and facilities, infrastructure and accommodation that would make it easy to attract to the tribunal international judges of repute and other international civil servants. It would also be convenient if the language of the State were one of the languages of the tribunal and if the State possessed it own well-established legal profession, which might provide one readily available source of defence counsel. However, the most critical criterion must be that the State not be seen, especially by Cambodians, as having been intimately involved in the events surrounding the period of Democratic Kampuchea. The Group recommends that, in the light of these criteria, the United Nations should seek such a location for the tribunal. It is the fervent hope of the Group that some State will step forward and offer to host the tribunal.

173. If this recommendation were adopted, it is imperative that the United Nations and the Government of Cambodia, in cooperation with the host State, establish effective mechanisms for the dissemination of the proceedings to Cambodia. A dedicated television channel and radio channel, free of government control, is one option. This method proved particularly important during the period of the United Nations Transitional Authority in Cambodia (UNTAC), which was able to broadcast information about fair elections as well as the messages of various political parties and lay the groundwork for the election it organized and conducted in May 1993. (As part of this effort, the Government of Japan donated thousands of small transistor radios for distribution throughout

the country.) Without effective dissemination of the proceedings, much of the trials' impact on and relevance for Cambodia will be lost wherever they are held.

174. Lastly, the Group has considered the best location for the Deputy Prosecutor and the prosecutorial staff in light of the above. (Because the Prosecutor would be the same as the Prosecutor of the existing tribunals, his or her office would remain in The Hague.) It is our view that the main office of the Deputy Prosecutor should be co-located with the tribunal, rather than either in The Hague or in Cambodia. This would serve three key purposes. First, it would provide the proximity to the tribunal necessary for effective trial strategy. Second, it would help preserve the confidences of that office from unauthorized disclosures or attempts to remove materials or disrupt the functioning of the office. Third, it would further reduce the possibility for interested parties in Cambodia to influence prosecutorial decisions on indictments and trial strategies, a risk which will have already been significantly reduced by virtue of the location of the Prosecutor outside Cambodia in The Hague.

175. At the same time, the Group believes it is imperative that the office of the Prosecutor have a significant presence in Cambodia through the establishment of a Phnom Penh-based investigations office. This office, staffed by investigators and, as necessary, prosecutors, would be the focal point in Cambodia for the investigative process. It would need effective security provided by the United Nations, but less than would be required if the entire prosecutorial staff were placed there.

5. A phased-in approach

176. In order to avoid a situation where the United Nations invests significant resources in a court that finds itself without suspects, the Group recommends that the United Nations adopt a phased-in approach for the functioning of the tribunal. After the appointment of the Deputy Prosecutor and an investigations unit, investigations would begin and indictments presented to a small ad hoc group of judges. The full complement of judges would not serve full-time until a number of indictees had been arrested. A similar process was adopted for the establishment of the International Criminal Tribunal for Rwanda.

6. Funding

177. A United Nations tribunal will also require continuous, assured funding by the United Nations through its regular assessments upon Member States. To facilitate the start-up of the tribunal, a trust fund or some other special fund with contributions from States and individuals is important. There is no doubt that such a tribunal will involve a significant commitment of resources, as the appropriation for the International Tribunal for the Former Yugoslavia for 1998 was $68,829,800 (gross) and that for the International Criminal Tribunal for Rwanda was $56,736,300 (gross). However, the Group believes that substantial savings can be achieved in the case of a tribunal for Cambodia because of what appears to be the smaller number of targets of investigation and because of our recommendation in section X.A below.

7. Recommendations

178. The foregoing analysis describes how an international tribunal should be structured to achieve the goals of justice. The Group has carefully considered this option and believes that it represents the best possibility for fair accountability of the Khmer Rouge leaders and responds in the most effective way to the 1997 request of the Cambodian Government for international assistance. Part of our reasoning for this recommendation is, of course, negative in that it is based upon our rejection of the option of trials in a Cambodian court for the reasons stated above. But it is nonetheless incumbent upon the Group to justify this option as superior to what we have earlier rejected and as worthy of pursuit despite its own particular difficulties.

179. At the core of the Group's justification for its recommendations is its firm belief that only a United Nations tribunal can be effectively insulated from the stresses of Cambodian politics that we discuss in detail in section VI above and that we believe would ultimately prove fatal to the viability of a Cambodian court. A United Nations tribunal can be set up with the support of the Cambodian Government but without requiring that Government to take various legislative and administrative initiatives that are likely to permit significant political factors to intrude upon and delay matters. With a United Nations tribunal, once the Cambodian Government has given its consent to the establishment of the tribunal, the staffing and operation are completely the responsibility of the United Nations. While it requires the cooperation of the Cambodian Government, it does not need it in the direct, affirmative sense. Moreover, United Nations officials are wholly independent and remote from the pressure of Cambodian domestic politics.

180. Two significant precedents inform our consideration in this regard. First is the work of UNTAC from 1992 to 1993. Analysts of that operation agree that the most effective component of UNTAC was the electoral component because it was the only component with an explicit mandate in the Paris Accords to act on its own - to organize and conduct elections - regardless of the views of the political factions and thus did not depend on their active support.[81] Those components of UNTAC whose functions relied upon ongoing cooperation of the political factions - whether in the military, civilian, or human rights area - were less successful in accomplishing the tasks in their mandate. Second is the failure of the Cambodian Government to enact a new criminal code in the five years since the departure of UNTAC despite the presence of legal consultants from international organizations, foreign Governments, and non-governmental organizations. It is our view that only by placing the responsibility for the establishment of the tribunal on the United Nations will a similarly slow and politically laden process be avoided.

181. The Group is aware, of course, that even a United Nations tribunal will need the cooperation of the Cambodian Government in many critical areas, notably apprehension of defendants and securing access to witnesses and evidence. There will be no Stabilization Force in Cambodia to undertake these functions. Nevertheless, from our perspective, the more insulated the tribunal can be from domestic politics, the better.

182. This perspective also informs our views regarding the time and money necessary to set up a United Nations tribunal. Based on the precedents of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, it may take at least a year, and perhaps two, before a tribunal is functioning and able to try defendants. This seems like a long time to wait for justice, and it might be suggested that the United Nations operation would be slower than a Cambodian court. (A United Nations tribunal for Cambodia might be able to be established faster than the Yugoslavia and Rwanda Tribunals, and we make recommendations in this regard in section X.A below.) But even if it took the full two years, the international community would at least know, with some confidence, that progress was being made and that the tribunal would eventually be functional. To place the onus of responsibility on Cambodia, even with significant international funding and personnel, would create uncertainty as to whether the tribunal would ever function.

183. As for the financial commitment involved, the monetary costs of a United Nations tribunal are, in our view, likely to be higher than the amount necessary to be invested in a Cambodian court with a heavy international presence. But they may well not be significantly higher, as the amount of international resources in either case is likely to be high. And we believe that there is less danger of a wasted investment if the United Nations, rather than the Cambodian Government were to establish the tribunal.

184. The Group recognizes that the creation of an ad hoc international tribunal will require an investment of political will and money on behalf of the international community. As for the role of Cambodia, it is our hope that the Government of Cambodia will follow through on the spirit of its letter of 21 June 1997 to the Secretary-General and fully support the establishment and operation of the court by the United Nations.

C. A Cambodian tribunal under United Nations administration

185. The third proposal the Group considered is a hybrid of the previous two models: a tribunal established under Cambodian law, but subject to the control and operation of the United Nations.

186. The establishment of such a tribunal would be done through two simultaneous legal undertakings. First, the United Nations, through the Secretary-General, would enter into an international agreement with the Cambodian Government establishing the legal status of the tribunal, the obligations of the United Nations and the obligations of Cambodia. Second, the Cambodian Government would pass a law that formally establishes the tribunal according to the terms of its agreement with the United Nations. A statute of the tribunal would be annexed to the Cambodian law and the agreement as well. The jurisdiction of such a court could comprise only international crimes, only Cambodian crimes, or extend to both.

187. As for the court's operation, it is essential that, in order to preserve the independence of the court and address the concerns noted above about political interference, the United Nations should have control over certain key elements of the tribunal's functioning. These would include the selection of

judges and the recruitment of the prosecutor and staff; their independence; the places of confinement of defendants and convicted prisoners; security for judges, lawyers, investigators, prisoners and witnesses; and other issues at the core of judicial independence. The location could be the subject of negotiation, although, based on the views above, trials outside Cambodia are still clearly preferable, in which case an agreement with the forum State would be needed.

188. Such a court is unprecedented, but its legal basis would resemble that of other United Nations-supported institutions established through agreements with Member States. These include the Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, the Latin American Institute for the Prevention of Crime and the Treatment of Offenders, the International Institute on Aging and the International Vaccine Institute.[82]

189. This option would seek to combine the advantages of the United Nations tribunal in terms of its independence with the connection to Cambodia inherent in domestic trials and also avoid such obstacles as may exist in setting up a United Nations tribunal. It would not require a resolution of the Security Council or the General Assembly, although the Secretary-General might wish to consult with those organs. The funding would be from voluntary contributions, rather than through the regular United Nations budget. The Secretary-General could be charged with the selection of judges from a list of candidates provided to him. Although the United Nations would retain control over hiring, the United Nations regulations that limit the number of personnel contributed from Governments would not apply, thus permitting more expeditious recruitment of staff and establishment of the tribunal and a lower cost to the United Nations budget.

190. The disadvantages of such a proposal, however, seem to the Group to outweigh any advantages. The key concern is that the negotiation of an agreement and the preparation of legislation for and its adoption by the Cambodian National Assembly could drag on. Many issues concerning the role of the United Nations would be part of this negotiation, and no progress could be made until all were settled. The Cambodian Government might insist on provisions that might undermine the independence of the court. The same concerns we express above about the Cambodia tribunal thus apply here. In contrast, a resolution of the Security Council (or even the General Assembly) is likely to move far more expeditiously. While the members of the Council will need to consult with the Cambodian Government, the burden of going forward will fall upon the Council rather than the Cambodian Government.

191. Furthermore, some of the advantages noted above may not prove to be so in fact. Although there would no doubt be monetary savings to the United Nations owing to the ability to rely extensively upon seconded personnel, the overall cost to the international community may well not be much less. The number of international personnel would still be significant, and will include the judges, prosecutorial staff, most of the investigators and much of the support personnel. The ability of seconded personnel to serve will depend on the willingness of their donors to part with them. This makes the stability of the operation less certain.

192. In the end, then, the Group is not prepared to endorse this option either. We recognize that it represents a possibility for Member States of the United Nations to consider. It is certainly preferable to the first option above. But it seems likely to equally prolong the impunity of the Khmer Rouge leaders until many of the likely defendants have died or, equally bad, make the United Nations a party to a process not meting out impartial justice.

D. An international tribunal established by multilateral treaty

193. This option would entail the creation of a court along the model of the International Military Tribunal at Nuremberg through a treaty among interested States.[83] In the case of Cambodia, this might be a combination of States in the region whose cooperation would be necessary to the effective functioning of a court and other interested States that might wish to contribute financial resources and personnel. It would avoid the creation of a new United Nations court. The Group declines to recommend this option because we are quite sceptical of the possibility of agreement among many States on the form of such a court. Protracted negotiations might well lead nowhere. This reasoning formed the basis for the Secretary-General's recommendations to the Security Council in 1993 and 1994 that the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda be established by Security Council resolution and not by treaty, and we find that reasoning equally applicable here.

E. Trials in other States

194. The fifth option considered by the Group is the trial of Khmer Rouge leaders by and in a State other than Cambodia. Such trials could take place as a matter of international law under the theory of universal jurisdiction, which gives each State the right to prosecute persons for genocide, crimes against humanity and other international crimes regardless of the place of the commission of the crimes or the nationality of the accused or the victims.[84] Trials could only take place in States that have criminal statutes providing for such universal jurisdiction or which otherwise are able to apply their ordinary criminal laws to cases without a link between the forum State and the site of the crime, the nationality of the victims or the nationality of the accused. If the accused or the victim happened to be a national of the State, then other bases for jurisdiction would be possible as well.

195. The Group is aware of a number of States with criminal statutes that, on their face, appear to permit trials of Khmer Rouge offenders. Many of these States have highly effective judiciaries in terms of the criteria we note above in section VIII.A.2. In that sense, they represent readily available venues for trials that would not entail the administrative or political difficulties inherent in establishing either an international or Cambodian court. Transportation of witnesses might be no more complicated than that involved in a United Nations tribunal. With respect to costs, while it would be unfair to impose the costs of a court onto one State, the international community could provide significant assistance to it through donations of money and personnel.

196. We do not, however, recommend the use of such States' judiciaries as the primary arena for trials because we believe that the responsibility for such trials rests with the Cambodian Government and the full international community. Moreover, while the Group believes in the importance of universal jurisdiction, we believe that, in the case of Cambodia, the message to the Cambodian people, so important in trials of the Khmer Rouge, would be diluted were those trials to take place before a court that was neither Cambodian nor international, but of a third State. We could, of course, imagine a State constructing an international court to try Khmer Rouge under its domestic law, but such a move is unprecedented and seems to us too unrealistic.

197. The Group nonetheless believes that, in the absence of a United Nations court, if States find that they have Khmer Rouge offenders on their territory, then they should prosecute them under their criminal laws, including by enacting legislation to give their courts jurisdiction over such offenders, or send them to a State willing to do so. Moreover, the Group would not wish to discourage arrangements by which accused persons could be transported to those States for trials.

IX. OTHER FORMS OF INDIVIDUAL ACCOUNTABILITY

198. In light of the Group's interpretation of its mandate as discussed in section II above, we have considered a number of other forms of individual accountability beyond criminal trials.

A. Investigatory commissions

199. The investigatory commission, commission of inquiry, or truth commission has emerged in the last 15 years as a highly significant mechanism of national reconciliation. Through a process of truth-telling by victims of atrocities and, in some instances, perpetrators, such commissions have helped to inform the public about the details of a dark period in a nation's history and contributed to the healing of victims and the society at large. Because their focus is on the historical period generally and not just the role of a relatively small number of indictees, they can paint a broader picture of the events of the period. Such commissions do not, however, result in judicial determinations of guilt, and it is our view that they could not replace prosecutions for Cambodia in terms of the goals of justice, closure and accountability.

200. A commission could, however, serve important interests for Cambodia. By telling a story beyond that concerning the defendants alone, including one that includes the historical context of the atrocities and the roles of many actors, it could contribute to achieving the educational, psychological, political and justice goals we elaborate in the introduction to this report. By listening to and acknowledging the victims, a commission could provide a form of spiritual reparation for them. The role of a commission in making recommendations regarding ways to protect human rights in the future also seems especially important in Cambodia.

201. The wide knowledge of the Khmer Rouge's atrocities would not detract from the useful role of a commission. Although the general pattern of crimes is well known, a detailed authoritative and unbiased accounting, including identification of specific perpetrators and victims, has not been assembled in a single source. The People's Republic of Kampuchea in absentia trials of Pol Pot and Ieng Sary in 1979 lacked credibility owing to their tainted circumstances; the United Nations has never produced any formal study of the atrocities, the 1978 report of the Subcommission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights[6] being merely a compilation of information from Governments and non-governmental organizations. Disagreement on many aspects of the Khmer Rouge period continues, including discrepancies over the number of people killed. The Khmer Rouge has engaged in disinformation concerning their brutal record and different political parties have their own versions of history. Moreover, as noted, the process of hearing from witnesses has a value in and of itself to them and to society.

202. During its mission to Cambodia, the Group raised the idea of a commission of inquiry with most of our Cambodian interlocutors, both governmental and non-governmental. The reactions were, in general, non-committal. Many seemed unclear as to the function of a commission; most said that they would have no objection to one, but that the priority for Cambodia was on trials of the Khmer Rouge and that a commission could not be a substitute for trials. Few overtly endorsed the idea and none suggested it to us of their own accord. These views, from the most educated and politically informed elements of Cambodian society, suggest that most Cambodians would not understand the purpose of a commission and its relationship to trials.

203. Beyond the points made to us by our Cambodian interlocutors, the Group has additional concerns about a commission. First, it is not apparent to us whether Cambodians themselves are prepared to participate in the processes undertaken by commissions, i.e., recounting by many witnesses of the events of the period. Some may fear former perpetrators who are still in their village; others might have an incentive not to tell the truth. These obstacles are, of course, also present with respect to criminal trials, but the role of counsel, investigators, judges, and, if necessary, protective measures for witnesses can help alleviate some of these problems. A commission would not need to rely upon the testimony of perpetrators, but, if it sought such testimony, it would need to take account of the inability of nearly all commissions to obtain such statements. Only the South African Truth and Reconciliation Commission was able to obtain substantial cooperation from perpetrators; but this came only as part of a package that provided them with the prospect of some form of amnesty, which we do not recommend.

204. Second, in previous cases, commissions were part of a political compromise between an outgoing, authoritarian regime and its opponents, as a way of clearing the ground for the future (including the possibility of trials). This is not at all what has occurred in Cambodia. Moreover, the Group is frankly not sure whether the Cambodian polity has yet achieved the level of national reconciliation needed to permit the establishment of a commission. The Group fears that the divisions in Cambodian society might frustrate the work of a commission in terms of its operation and the dissemination of its outcome. Various parties might reject the findings of the commission and, in any event,

widespread illiteracy would in many cases prove an obstacle to easy accessibility to the commission's report.

205. Third, the Group believes that any commission of investigation must be constructed in a way that does not impair the operation of a criminal trial. Previous commissions have generally managed to avoid these problems either because they completed their work before the trials began or because no trials followed the commission's report. But if the two were carried out simultaneously and were focusing on the same specific episodes, considerable difficulties might result for the fair conduct of trials, including the tainting of evidence and the risk of inconsistent statements to the two bodies. Moreover, in such a situation, the Cambodian public might not understand the different levels of proof applied by each body (with a much higher standard of proof in the criminal context).

206. It might be possible to reduce these problems through a commission that did not actually hear testimony, but was composed of historians and experts who attempted to write an authoritative accounting based on documentary evidence, or perhaps one that did not seek to name individual perpetrators. However, the extent to which a commission's report would be accepted by Cambodians if it did not rely on witness testimony is questionable. Such a procedure would also fail to accomplish some of the goals of healing for victims that comes from the process of giving or hearing testimony.

207. In light of the above, the Group believes it is premature to make a concrete recommendation in favour or against the establishment of a commission of inquiry. Rather, we believe it would be useful for the Cambodian people, through its Government and non-governmental sectors, to engage in a process of reflection to consider appropriate steps on the truth-seeking front. This would help them determine whether a commission of inquiry is desirable and what form it should take. Each commission to date has been tailored to the circumstances of the State concerned regarding the entity establishing it, its mandate, its composition, its ability to subpoena witnesses, its ability to name perpetrators in the final report, its duration, its relationship to prosecutions and other factors. These same matters would need to be addressed for Cambodia.

208. To assist the Cambodian people in this endeavour, we recommend that the United Nations, through the United Nations High Commissioner for Human Rights, work with the sectors of the Cambodian population to inform them about such commissions and foster dialogue on the issue. In particular, the High Commissioner, through her Cambodia office, could organize a series of conferences on this question. It is our hope that the Government and non-governmental sectors will carefully consider whether such an exercise would be a beneficial complement to the trials that we recommend.

209. At the same time, however, we would hope that the Prosecutor would be able to present his or her case against the accused in a way that sheds light on the range of atrocities committed by the regime of Democratic Kampuchea, so that Cambodians following the trial are able to learn about their past. This is yet another way in which trials can promote knowledge and national reconciliation.

B. Removal and exclusion from office

210. The Group has noted the policy in several countries of removing and excluding from office persons responsible for serious violations of human rights. Cambodia has a statute outlawing the Khmer Rouge, but there remains the possibility that targets of investigation for atrocities in the 1970s may hold office now or may wish to hold it in the future. The Group believes that any persons implicated in such crimes should not hold public office. It therefore recommends that, following the establishment of a tribunal to try Khmer Rouge leaders, Cambodia enact a statute requiring all persons convicted by the tribunal to be thereupon barred from holding public office.

C. Financial accountability

211. It is frequently asserted that certain members of the Khmer Rouge have amassed vast amounts of wealth in the years since their ouster from power. These have come principally from timber and gem concessions, the fruits of which have been illegally provided to Cambodian and foreign business interests in the areas the Khmer Rouge has controlled. Some of this money is said to be in foreign banks.

212. The Group believes that the wealth of Khmer Rouge leaders convicted by a tribunal should represent a form of monetary reparation for the victims of the Khmer Rouge. The possibility of requiring defendants to pay compensation to victims is included in the statutes of the existing ad hoc tribunals and has recently been affirmed in the statute of the International Criminal Court.[85] We thus recommend that any tribunal provide for the possibility of reparations by the defendant to his victims, including through a special trust fund, and that States holding such assets arrange for their transfer to the tribunal as required to meet the defendant's obligations in this regard. Beyond this, States in which Khmer Rouge assets obtained illegally are present should explore other options for providing compensation to victims from these assets.

X. OTHER ASPECTS OF TRIALS

A. Moving the process quickly

213. The Group is concerned that any United Nations tribunal along the lines of that recommended will be established somewhat slowly and then only trudge through its caseload. The Group thus recommends that the United Nations, building upon its experience with the prior tribunals, undertake all necessary measures to expedite the establishment of the court. These should certainly include exemptions from competitive bidding and, most important, from limitations on secondment to take effect immediately upon the court's legal establishment. The budgetary approval process also needs to be streamlined. Furthermore, we believe that the registry functions of the new tribunal should be shared with those of the International Tribunal for the Former Yugoslavia, with only a small office co-located with the new court; it is our sense that a free-standing and independent registry would entail both delays and unnecessary costs and should be avoided. Finally, once the court is established, the Group

recommends that the judges exercise active case management to move the cases through quickly. The entire process should involve close consultation with officials of the existing tribunals to learn from their past experience.

B. Methods of prosecution and admission of evidence

214. Related to the above question is the method of prosecution. The adversarial system of the common law jurisdictions has, in general, been followed by the two existing ad hoc tribunals and is contemplated for the International Criminal Court. Nevertheless, a more hybrid system that borrows certain elements from the civil law jurisdictions is worth considering. Cambodian procedure relies substantially upon the French system and adoption of elements of that system might also contribute to grounding the court in the Cambodian experience. At the same time, any system must fully respect the defendants' rights as provided for in the International Covenant on Civil and Political Rights.[78]

215. With respect to evidence, our report indicates that much of the evidence is old and that record-keeping in many cases was shoddy. Given the state of the evidence and the duration of time since the crimes, the Group believes that a court will need to adopt the civil law approach currently found in the rules of evidence of the two existing United Nations tribunals as well as of many States - one that admits all evidence that is relevant and probative and leaves its evaluation up to the judges.[86] Such an approach is in the circumstances preferable to reliance upon such common law notions as the hearsay rule and its lengthy list of exceptions.

C. Protection of evidence and witnesses

216. The decaying state of much physical evidence and the apprehension that some witnesses may feel about testifying underline the importance of protective measures by the court eventually established. Original documents need to be placed in secure, dry and climate-controlled facilities that will protect them from various possibilities of destruction. Witnesses will need to be protected before, during and potentially after trial and, where necessary and subject to proper safeguards, it may sometimes be appropriate to conceal their identity.

D. Cooperation regarding evidence

217. Earlier in the report, we emphasized the cooperation of other States with respect to the apprehension and handing over of suspects. The Group also wishes to point out the necessity of cooperation from States with evidence or witnesses on their soil. We mention, in particular, Viet Nam, owing to the likely presence of documents removed from Cambodia after the ousting of the Democratic Kampuchea regime, but other States in the region may also have documents as well as witnesses.

E. Post-conviction issues

218. Upon conviction of defendants, their sentences would need to be served in prisons meeting international standards and with minimal risk of escape. In light of our views put forward above, this argues for incarceration in States other than Cambodia. Commutation of sentences should, in accordance with the statutes of the existing United Nations tribunals, rest solely at the discretion of the president of the tribunal, who would decide such matters based on the interests of justice and principles of law.[87]

XI. SUMMARY OF PRINCIPAL RECOMMENDATIONS

219. The above discussion contains, we hope, an exhaustive treatment of the issues assigned to the Group of Experts by the Secretary-General. Without attempting to restate all our recommendations, we reiterate those of most importance:

1. We recommend that, in response to the request of the Government of Cambodia of 21 June 1997, the United Nations establish an ad hoc international tribunal to try Khmer Rouge officials for crimes against humanity and genocide committed from 17 April 1975 to 7 January 1979.

2. We recommend that, as a matter of prosecutorial policy, the independent prosecutor appointed by the United Nations limit his or her investigations to those persons most responsible for the most serious violations of international human rights law and exercise his or her discretion regarding investigations, indictments and trials so as to fully take into account the twin goals of individual accountability and national reconciliation in Cambodia.

3. We recommend that the Security Council establish this tribunal or, should it not do so, that the General Assembly establish it.

4. We recommend that the tribunal comprise two trial chambers and an appellate chamber and that the United Nations actively seek to include on the tribunal a Cambodian national whom it believes is qualified, impartial and appropriate.

5. We recommend that the Prosecutor of the International Tribunal for the Former Yugoslavia and of the International Criminal Tribunal for Rwanda serve as the Prosecutor of the new tribunal, with a Deputy Prosecutor specifically charged with responsibility for this tribunal.

6. We recommend that the tribunal, including the office of the Deputy Prosecutor, be established in a State in the Asia-Pacific region, but not in Cambodia; that the Prosecutor establish an investigations office in Cambodia; and that the United Nations, in cooperation with the Government of Cambodia, arrange for the unfettered dissemination of the proceedings in Cambodia by radio and television.

7. We recommend that the full panel of judges appointed by the United Nations not commence full-time service until at least some indictees have been arrested.

8. We recommend that the United Nations undertake special measures for the protection of physical evidence and of witnesses as necessary, and that States with evidence and witnesses on their territory make them available to the Prosecutor.

9. We recommend that the tribunal established provide for the possibility of reparations by defendants to victims, including through a trust fund or some other special fund, and that States holding such assets arrange for their transfer to the tribunal as required to meet the defendants' obligations in this regard.

10. We recommend that the United Nations, in cooperation with the Cambodian Government and the non-governmental sector, encourage a process of reflection among Cambodians to determine the desirability and, if appropriate, the modalities of a truth-telling mechanism to provide a fuller picture of the atrocities of the period of Democratic Kampuchea.

220. In asking for United Nations assistance, the Government of Cambodia has responded to what we sense is the desire of the Cambodian people for justice and their knowledge that it is impossible to simply ignore the past. Rather, it is necessary to understand the past and move beyond it by seeing justice done for those responsible for it. This process has been too long delayed for Cambodia and the time for action is here. If these and our other recommendations are pursued by the United Nations now, with the support of the Government of Cambodia, we believe they will lead to a process that will truly enable Cambodia to move away from its incalculably tragic past and create a genuine form of national reconciliation for the future.

(Signed) Rajsoomer LALLAH (Signed) Ninian STEPHEN (Signed) Steven R. RATNER
Chairman

18 February 1999

Notes

[1] This discussion draws upon a number of well regarded scholarly works on the Khmer Rouge period: David P. Chandler, The Tragedy of Cambodian History: Politics, War, and Revolution since 1945 (New Haven: Yale University Press, 1991); Karl D. Jackson, ed., Cambodia 1975-1978: Rendezvous with Death (Princeton: Princeton University Press, 1989); Elizabeth Becker, When the War was Over: The Voices of Cambodia's Revolution and its People (New York: Simon & Schuster, 1986); Ben Kiernan, How Pol Pot Came to Power: A History of Communism in Kampuchea (London: Verso, 1985); Nayan Chanda, Brother Enemy: The War After the War (San Diego: Harcourt Brace Jovanovich, 1986); Ben Kiernan, The Pol Pot Regime (New Haven: Yale University Press, 1996).

Other sources used for this discussion are: Federal Research Division, Library of Congress, Cambodia: A Country Study (Russell R. Ross ed.) (Washington: U.S. Government Printing Office, 1990); William Shawcross, Sideshow: Kissinger, Nixon and the Destruction of Cambodia (rev. ed.) (New York: Simon & Schuster, 1987); François Ponchaud, Cambodia: Year Zero (Nancy Amphoux trans.) (New York: Holt Rinehart & Winston, 1978); Ben Kiernan, "The Cambodian Genocide: Issues and Responses", in George J. Andreopoulos, ed., Genocide: Conceptual and Historical Dimensions, p. 191 (Philadelphia: University of Pennsylvania Press, 1994); David Hawk, "International Human Rights Law and Democratic Kampuchea", International Journal of Politics (1986), vol. 16, issue 3; Haing Ngon, A Cambodian Odyssey (New York: Warner Books, 1987); Hurst Hannum, "International Law and Cambodian Genocide: The Sounds of Silence", Human Rights Quarterly (1989), vol. 11, issue 1; Ben Kiernan, Cambodia: The Eastern Zone Massacres (New York: Center for the Study of Human Rights, Columbia University, 1986); Steven R. Ratner, "The Cambodia Settlement Agreements", American Journal of International Law (1993), vol. 87, issue 1; Steven R. Ratner, The New UN Peacekeeping: Building Peace in Lands of Conflict After the Cold War, pp. 157-206 (New York: St. Martin's Press, 1995).

[2] Foreign Broadcast Information Service, 9 May 1975, quoted in Jackson, "The Ideology of Total Revolution", in Cambodia: 1975-1978, op. cit., pp. 37, 67.

[3] Quoted in Chanda, op. cit., p. 254. The 100,000 figure is from Kiernan (1986), op. cit., p. 7.

[4] See Karl D. Jackson, "Introduction: The Khmer Rouge in Context", in Cambodia: 1975-1978, op. cit., p. 3; Kiernan (1994), op. cit., pp. 191-92.

[5] See Kiernan (1994), op. cit., p. 193 (table 5). These data also show a death rate of 50 per cent for the Chinese minority, 36 per cent for the Cham, and 40 per cent for ethnic Thai.

[6] See analysis prepared on behalf of the Subcommission on Prevention of Discrimination and Protection of Minorities by its Chairman of materials submitted to it and the Commission on Human Rights under decision 9 (XXXIV) of the Commission on Human Rights, 30 January 1979 (E/CN.4/1335).

[7] General Assembly resolution 2391 (XXIII), annex.

[8] A/CONF.183/9, article 29.

[9] General Assembly resolution 260 A (III), annex, article 2.

[10] Multilateral Treaties Deposited with the Secretary-General (United Nations publication, Sales No. E.98.V.2).

[11] See, e.g., Revised and updated report on the question of the prevention and punishment of the crime of genocide, prepared by B. Whitaker, 2 July 1985, E/CN.4/Sub.2/1985/6, p. 10; Hannum, op. cit., pp. 110-12; Kiernan (1994), op. cit., pp. 191-93. But see David P. Chandler, A History of Cambodia, pp. 218-19 (Boulder: Westview Press, 1992).

[12] See, e.g., Kiernan (1994), op. cit., pp. 191-93; Hannum, op. cit., pp. 110-12; Kathryn Railsback, "A Genocide Convention Action Against the Khmer Rouge: Preventing a Resurgence of the Killing Fields", Connecticut Journal of International Law, vol. 5, pp. 457, 465 (1990). But see Chandler (1992), op. cit., p. 219. On deriving intent, see Prosecutor v. Akayesu, Judgement, International Criminal Tribunal for Rwanda, Trial Chamber, 2 September 1998, para. 523.

[13] See, e.g., Hurst Hannum and David Hawk, The Case Against the Standing Committee of the Communist Party of Kampuchea, 15 September 1986, pp. 147-49 (draft memorial prepared for possible case in International Court of Justice against Democratic Kampuchea).

[14] See David Hawk, "The Cambodian Genocide", in Ismael W. Charney, ed., Genocide: A Critical Bibliographic Review, pp. 137, 139-40 (New York: Facts on File Publications, 1988); Kiernan (1994), op. cit., pp. 201-02; Hannum, op. cit., pp. 111-12.

[15] See the contrasting views described in Kiernan (1994), op. cit., pp. 205-06.

[16] Charter of the International Military Tribunal at Nuremberg, article 6 (c); Nazi and Nazi Collaborators (Punishment) Law, 5710/1950, article 1 (b) (Israel).

[17] This factor is not required today. See statute of the International Criminal Tribunal for Rwanda, article 3; statute of the International Criminal Court, article 7.

[18] Charter of the International Military Tribunal at Nuremberg, article 6 (c); Trials of Major War Criminals before the International Military Tribunal, vol. 22, pp. 498, 547-49, 563-66 (1946); United States v. Flick et al., Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, vol. 6, pp. 1187, 1213 (1947); but see United States v. Ohlendorf et al., Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, vol. 4, pp. 411, 499 (1948).

[19] See Jackson, "The Ideology of Total Revolution", op. cit., pp. 39-49; Kiernan (1996), pp. 65-125.

[20] For an account, see Steven R. Ratner and Jason S. Abrams, Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy, pp. 53-54 (Oxford: Clarendon Press, 1997).

[21] Report of the International Law Commission to the General Assembly, A/2693 (1954), reprinted in 1954 [II] Yearbook of the International Law Commission, pp. 140, 150.

[22] M. J. Bowman and D. J. Harris, Multilateral Treaties: Index and Current Status, pp. 154-55, 419 (London: Butterworths, 1984). The Provisional Revolutionary Government of the Republic of Viet Nam became a party in 1974; the Socialist Republic of Viet Nam confirmed the continued adherence of Viet Nam to the Conventions on 4 July 1976.

[23] Chanda, op. cit., pp. 11-13, 86-87, 192-225, 333-43; Chandler (1991), op. cit., pp. 256-57, 271-72.

[24] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, United Nations, Treaty Series, vol. 75, No. 970, articles 13, 31, 40; Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949, United Nations, Treaty Series, vol. 75, No. 972, article 6.

[25] Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, United Nations, Treaty Series, vol. 75, No. 973, article 4.

[26] See Kram No. 913-NS, article 22, Journal Officiel du Cambodge, 2 December 1954. The definition of protected persons in article 4 of the Fourth Geneva Convention also covers stateless persons. Jean S. Pictet, Commentary, Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, p. 47 (Geneva: International Committee of the Red Cross, 1958).

[27] For a detailed discussion, see Ratner and Abrams, op. cit., pp. 94-95.

[28] Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, International Tribunal for the Former Yugoslavia, Appeal Chamber, 2 October 1995, paras. 128-36 [hereinafter Tadic Interlocutory Appeal].

[29] United Nations, Treaty Series, vol. 249, No. 3511 [hereinafter Hague Convention]; Bowman and Harris, op. cit., pp. 192, 193.

[30] See, e.g., Becker, op. cit., pp. 264-65; Library of Congress, op. cit., pp. 118-119.

[31] Hague Convention, preamble, articles 3, 4 (1), 5, 7-10.

[32] Multilateral Treaties Deposited with the Secretary-General, op. cit., p. 705; Bowman and Harris, op. cit., p. 87. It is difficult to conclude that

the Khmer Rouge committed slavery as defined in international conventions. See Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 7 September 1956, United Nations, Treaty Series, vol. 266, No. 3822, article 7 (a).

[33] Forced Labour Convention, (International Labour Organization, No. 29), articles 2, 11-13, 16, 18, 19, 39.

[34] Ibid., article 2 (b).

[35] Ibid., article 2 (d).

[36] See Jackson, "The Ideology of Total Revolution", op. cit., pp. 48-49.

[37] General Assembly resolution 39/46, annex.

[38] General Assembly resolution 2200 A (XXI).

[39] General Assembly resolution 3452 (XXX), annex, articles 1 and 2.

[40] See Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, General Assembly resolution 3166 (XXVIII), annex.

[41] See Shawcross, op. cit., at 366-67.

[42] See, e.g., Charter of the International Military Tribunal, article 6 (a); Control Council Law No. 10, article II (2); Convention on the Prevention and Punishment of the Crime of Genocide, article III; statute of the International Tribunal for the Former Yugoslavia, article 7 (1); 1996, International Law Commission, Draft Code of Crimes Against the Peace and Security of Mankind, article 2 (3); statute of the International Criminal Court, article 25.

[43] The exact standards vary among cases and legal instruments. See, e.g., United States v. List et al., Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, vol. 22, pp. 1230, 1286, 1303 (1948); Protocol I Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of International Armed Conflicts, 12 December 1977, United Nations, Treaty Series, vol. 1125, No. 1752; International Tribunal for the Former Yugoslavia statute, article 7 (3); statute of the International Criminal Court, article 28. See also Prosecutor v. Delalic et al., Judgement International Tribunal for the Former Yugoslavia, Trial Chamber, 16 November 1998, paras. 330-401.

[44] Trials of Major War Criminals before the International Military Tribunal, vol. 22, p. 466; Yoram Dinstein, The Defense of 'Obedience to Superior Orders' in International Law, pp. 51-57, 76-83 (Leiden: A. W. Sijthoff, 1965).

[45] See, e.g., Charter of the International Military Tribunal, article 8; Control Council Law No. 10, article II (4) (b); statute of the International Tribunal for the Former Yugoslavia, article 7 (4).

[46] For a modern codification of these defences, see statute of the International Criminal Court, articles 31-33, see also Prosecutor v. Erdemovic, Judgement, International Tribunal for the Former Yugoslavia, Appeals Chamber, 7 October 1997 (by 3-2 vote, duress not a defence to crimes against humanity).

[47] No available caselaw appears to elaborate the codes. The 1956 Code is not published in a form that shows amendments and other changes since its original publication.

[48] These are the Kingdom of Cambodia (1953-1970), the Khmer Republic (1970-1975), Democratic Kampuchea (1975-1979), the People's Republic of Kampuchea/State of Cambodia (1979-1991), the Supreme National Council/United Nations Transitional Authority in Cambodia (1991-1993), and again the Kingdom of Cambodia (1993-present).

[49] Cambodian criminal law, based on French law, also recognizes the principle of non-retroactivity. Code Pénal, article 6, citing Cambodian Constitution (1947), article 19 (2).

[50] See, e.g., Trials of Major War Criminals before the International Military Tribunal, vol. 22, pp. 465-66; Attorney-General of the Government of Israel v. Eichmann, International Law Reports, vol. 36, issue 5, pp. 47-48 (Dist. Ct. Jerusalem (1961), affirmed, International Law Reports, vol. 36, p. 277 (Israel 1962); Border Guards Prosecution Case, International Law Reports, vol. 100, pp. 366, 379-86 (Germany 1992).

[51] Code Pénal, article 5.

[52] Ibid., article 4, pp. 21-23.

[53] Code de Justice Militaire, article 155.

[54] Regarding French law, see Nguyen Quoc Dinh, Patrick Daillier and Alain Pellet, Droit International Public, pp. 228-29, 632-33 (Paris: Librairie Générale de Droit et de Jurisprudence, 5th ed., 1994); Elisabeth Zoller, "La definition des crimes contre l'humanité", Journal de Droit International, vol. 120, pp. 549, 550-551 (1993).

[55] Code Pénal, articles 77-88.

[56] Ibid., articles 89-104.

[57] Ibid., articles 109-14; see generally Gaston Stefani, Georges Levasseur and Bernard Bouloc, Procédure Pénale 135-51 (Paris: Dalloz, 16th ed., 1996).

[58] For a discussion of these precedents, see Ratner and Abrams, op. cit., at 126-27.

[59] Reuters News Service, 30 December 1998; see also interviews with the King in Cambodia Daily, pp. 9-11, May 1997, p. 1, and Cambodia Today, 23 August 1996, p. 1.

[60] For one illuminating, though admittedly unscientific survey, based on interviews with 21 Cambodians of various backgrounds, see Jaya Ramji and Christine Barton, Accounting for the Crimes of the Khmer Rouge, 1975-1979: Interviews with Cambodians (Phnom Penh: Documentation Center of Cambodia, 1997). On 27 January 1999, the Institut Français de la Statistique, de Sondage d'Opinion et de Recherche sur le Cambodge released the results of a 1998 poll in which 81.1 per cent of 1,503 Cambodians of various walks of life answered affirmatively to the question "Do you want Khmer Rouge leaders under the Pol Pot regime to be prosecuted?" Finally, in a letter to the Secretary-General, dated 20 January 1999, the Cambodian Human Rights Action Committee, a coalition of 17 Cambodian non-governmental organizations, stated that some 84,195 Cambodian nationals had signed or thumbprinted a petition in favour of trials.

[61] Agreement Concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia, 23 October 1991, article 3 (2) (b).

[62] Treaty between the Kingdom of Thailand and the Kingdom of Cambodia on Extradition, 6 May 1998.

[63] See, e.g., Immigration Act, B.E. 2522 (1979), as amended by Immigration Act (No. 2), B.E. 2523 (1980) (Thailand), chapter VI.

[64] See, e.g., International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Yearbook 1996, p. 233 (1997) (United Nations publication, Sales No. E.97.III.P.1) (text of implementing legislation enacted by States, for cooperation with the International Tribunal for the Former Yugoslavia).

[65] Agreement Concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia, article 3 (2) (c).

[66] Cambodian Constitution (1993), article 109.

[67] Ibid., article 115; Law on the Organization and Functioning of the Supreme Council of Magistracy, 22 December 1994.

[68] See, Cambodian Constitution, article 32.

[69] Ibid., article 38.

[70] "Laws and standard documents in Cambodia that safeguard State properties, rights, freedom and legal private properties and in conformity with the national interests, shall continue to be effective until altered or abrogated by new texts, except those provisions that are contrary to the spirit of this Constitution."

[71] Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period, decision of 10 September 1992, article 1.

[72] Ibid., articles 10-30.

[73] Law on Criminal Procedure, articles 76, 97-98, 161.

[74] International Covenant on Civil and Political Rights, articles 9, 14; Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 30 August 1955 (United Nations publication, Sales No. E.88.XIV.1).

[75] See statute of the International Criminal Court, preambular paragraph 3 ("Recognizing that such grave crimes threaten the peace, security and well-being of the world"); Official Records of the General Assembly, Sixth Committee, Third Session, 100th, 101st meetings, A/633 (1948) (suggestions by some drafters of the Convention on the Prevention and Punishment of the Crime of Genocide that all cases of genocide inherently threaten international peace).

[76] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 International Court of Justice Reports, pp. 16, 53. See also Bruno Simma, ed., Charter of the United Nations: A Commentary, pp. 410-11 (Oxford: Oxford University Press, 1995).

[77] See Prosecutor v. Blaskie, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Yugoslavia Tribunal Appeals Chamber, 29 October 1997.

[78] Tadic Interlocutory Appeal, paras. 26-48.

[79] See, e.g., Security Council resolutions 731 (1992) and 748 (1992), Official Records of the Security Council, Forty-seventh Year, Resolutions and Decisions (S/INF/48).

[80] General Assembly resolution 1000, Official Records of the General Assembly, First Emergency Special Session, Supplement No. 1 (A/3354), p. 3; General Assembly resolution 2248, Official Records of the General Assembly, Fifth Special Session, Supplement No. 1 (A/6657), p. 1; General Assembly resolution 45/2, Official Records of the General Assembly, Forty-fifth Session, Supplement No. 49A (A/45/49).

[81] See Ratner (1995), op. cit., at 177-81; Michael W. Doyle, "Authority and Elections in Cambodia", in Michael W. Doyle, Ian Johnstone and Robert C. Orr, eds., Keeping the Peace: Multidimensional UN Operations in Cambodia and El Salvador, pp. 134, 161-64 (Cambridge: Cambridge University Press, 1997).

[82] See, e.g., Agreement (with annex) for the establishment of the Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, United Nations-Japan, 15 March 1961, United Nations, Treaty Series, vol. 397, No. 5706; Agreement for the establishment of the Latin American Institute for the Prevention of Crime and the Treatment of Offenders, United Nations-Costa Rica, 11 July 1975, United Nations, Treaty Series, vol. 973, No. 14107.

[83] See Agreement for the prosecution and punishment of the major war criminals of the European Axis, 8 August 1945, United Nations, Treaty Series, vol. 82, No. II 251.

[84] Eichmann, International Law Reports, vol. 36, pp. 26-57, 279-304; Matter of the Extradition of Demjanjuk, Federal Reporter 2d, vol. 776, pp. 571, 582-83 (6th Cir. 1985); American Journal of International Law (1998), vol. 92, p. 78 (Military Tribunal, Division 1, Switzerland 1997); Public Prosecutor v. Djajic, American Journal of International Law, vol. 92, p. 528 (1998) (Bavarian Supreme Court, Germany, 1997).

[85] Statute of the International Tribunal for the Former Yugoslavia, article 24 (3); statute of the International Criminal Court, article 75.

[86] See International Tribunal for the Former Yugoslavia Rules of Evidence (as amended through 10 July 1998), Rule 89, IT/32/Rev.13.

[87] See statute of the International Tribunal for the Former Yugoslavia, article 28.

Annex

List of appointments of the Group of Experts
(in chronological order, title indicated as
of the date of the meeting)

New York, 8-11 September 1998

United Nations Office of Legal Affairs

Kofi Annan, Secretary-General of the United Nations

Representatives of the Lawyers Committee for Human Rights

David Scheffer, United States Ambassador-at-Large for War Crimes Issues

United Nations Department of Political Affairs

Asda Jayanama, Permanent Representative of Thailand to the United Nations; Felipe Mabilangan, Permanent Representative of the Philippines to the United Nations; Karen Tan, Deputy Permanent Representative of Singapore to the United Nations

Takeshi Kamitani, Minister, Permanent Mission of Japan to the United Nations

Representatives of the Permanent Missions of the member States of the European Union to the United Nations

Zhou Fei, First Secretary, Permanent Mission of China to the United Nations

Phnom Penh, 15-22 November 1998

Documentation Center of Cambodia

Hun Sen, Second Prime Minister

Royal Cambodian Government Human Rights Committee

Kenneth Quinn, Ambassador of the United States of America to Cambodia

Thun Saray, President, Association des droits de l'homme et du développement au Cambodge

National Archives

Kassie Neou, Executive Director, Cambodian Institute of Human Rights

Field visit to Trapeang Sva village, Kandal Province

Tuol Sleng Museum and archive

Say Bory, member, Constitutional Council

Ung Huot, First Prime Minister and Minister for Foreign Affairs

Masaki Saito, Ambassador of Japan to Cambodia

Sar Kheng, Co-Minister of the Interior

Representatives of the Cham community

Ly Vouch Leng, Under-Secretary of State for Justice; Henrot Raken, Chief Prosecutor

Dith Munthy, Chief Justice, Supreme Court

Prince Norodom Ranariddh, FUNCINPEC party leader; You Hockry, Co-Minister of the Interior; Prince Sisowath Sirirath

Om Khem, Director, Buddhist Institute

Lao Mong Hay, Director, Khmer Institute of Democracy

Lakhan Mehrotra, Personal Representative of the Secretary-General in Cambodia

Staff of the Cambodia Office of the United Nations High Commissioner for Human Rights

George Edgar, Ambassador of the United Kingdom of Great Britain and Northern Ireland to Cambodia

Chea Sim, Chairman, National Assembly

Bangkok, 22-24 November 1998

Vasin Teeravechyan, Director-General, Treaty and Legal Affairs Department, Ministry of Foreign Affairs

Sukhumbhand Paribatra, Deputy Foreign Minister, Ministry of Foreign Affairs

General Surayud Chulanont, Commander-in-Chief, Royal Thai Army

The Hague, 4 December and 17 December 1998 (Professor Ratner only)

Gabrielle Kirk McDonald, President, International Tribunal for the Former Yugoslavia

Louise Arbour, Prosecutor, International Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda

Geneva, 27 January 1999

Mary Robinson, United Nations High Commissioner for Human Rights

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